

You Can't Handle the Truth! Trial Juries and Credibility

*Renée McDonald Hutchins**

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I. INTRODUCTION

Every now and again, we get a look, usually no more than a glimpse, at how the justice system really works. What we see—before the sanitizing curtain is drawn abruptly down—is a process full of human fallibility and error, sometimes noble, more often unfair, rarely evil but frequently unequal.¹

* Associate Professor of Law, University of Maryland Carey School of Law. For comments on earlier drafts, I thank my colleagues in the Criminal Law Research Collective and the Clinical Theory Workshop. I also thank for their time and incredible talents my research assistants: Saidah Grimes, Claire McLamore, Stephanie Noronha, Derek Simmons, Akeel St. Jean, Christina Taylor, and Amond Uwadineke.

¹ Sydney H. Schanberg, *A Journey Through the Tangled Case of the Central Park Jogger*, VILLAGE VOICE, Nov. 19, 2002, available at <http://www.villagevoice.com/new/0247,schanberg,39999,1.html>.

*The central question, vital to our adjudicative model, is: How well can we expect a jury to determine credibility through the ordinary adversary processes of live testimony and vigorous impeachment? The answer, from all I have been able to see is: not very well.*²

It was the late 1990s, and I was working as a federal prosecutor at “Main Justice.” My special assignment to the local U.S. Attorney’s Office gave me an opportunity to sit second chair in a murder prosecution.³ Lead counsel was a highly experienced prosecutor. She had handled hundreds of major felony cases and scores of murder trials. The accused in our case was suspected of tracking a long-time rival one night and shooting him twice in the head. By the time of trial, the accused had been shot in retaliation. He was confined to a wheelchair. At trial, he chose to testify in his own defense. There was a tragic air to him—at just nineteen years of age, the retaliatory shooting had rendered him a paraplegic. Unable to mount the two short steps to the witness box, the court allowed him to testify from his place at counsel’s table. His direct examination went smoothly. Attractive and well-spoken, the defendant testified to his lack of involvement in the crime. “I was home in bed,” he assured the jury.

When it came time, my colleague worried that a rigorous cross-examination would appear heartless and offend the jurors. Going too easy on him, though, risked the possibility that the defendant’s claimed lack of involvement would survive untested. She decided to press him. The early portion of the cross-examination was unremarkable. Walking him through the details of the evening, the lead prosecutor was able to catch the defendant in only the most minor of discrepancies—what he had for dinner, what he was wearing, the name of the show he watched before going to bed. A turning point, however, came when she began questioning the defendant about his relationship with the victim.

After demonstrating the long and violent history between the two men, counsel moved to the night in question. “Isn’t it true,” she asked, “that [the victim] encroached on your territory and you wanted him dead?” “No,” he shot back. And then, as if on cue, his leg twitched, banging loudly against the edge of counsel’s table.

² H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale*, 42 DUKE L.J. 776, 827 (1993).

³ Names have been withheld and some details of the case have been modified to protect the privacy of those involved.

“Isn’t it true that you held a gun to the back of [the victim’s] head and pulled the trigger twice?” she continued. “No!” and again his leg slammed up into the table. “Isn’t it true that after the shooting you ran to your cousin’s house and told him to hide the gun in a shoebox?” The calm, composed young man from direct examination was gone. “No,” he sneered. But, once again, his leg jerked against the table. He moved his hand to his knee to keep it from knocking. I glanced at the jury. Had they seen what I’d seen? At the close of the evidence, it took less than an hour for the jury to return with a guilty verdict. Had the defendant’s involuntary muscle spasms during tough questioning been a sign of false testimony? That’s certainly the way I interpreted them. Conversations with some jurors after the verdict suggested that they thought so too. But were we right?

Everyone lies. Some people more than others. There is little question that many witnesses who take the stand and raise their hand to swear the oath thereafter present the jury with a false accounting of the facts. There is also no question that many others do not. Of those witnesses who do lie, they do so for any number of reasons—some compelling, some wholly self-serving.⁴ Whatever concessions we make with regard to the failings of witnesses, we allow very few similar concessions for the failings of jurors. We trust that, for the most part, jurors will be able to spot those who lie. We encourage jurors⁵ to watch witnesses carefully. We then trust that jurors have done their job well when, after watching a victim resolutely declare, “I’m 100% certain that’s the woman who did it,” they swiftly impose a verdict of guilt. We quiet ourselves with the alluring lullaby that blind faith in jurors is not a matter of expedience, but rather a demonstration of fairness. Jurors, we tell the naysayers, simply do it better.⁶ From messages delivered in best-selling fiction to instructions delivered by trial judges, our popular discourse is saturated with the notion that all firsthand observers have a particular advantage when making

⁴ Uviller, *supra* note 2, at 814 (“They will try to tell the truth, the whole truth, and nothing but the truth when their interest in promoting a falsehood is no stronger than their scruple. But raise the stakes (say a beloved child needs an alibi) and increase the certainty of impunity (it’s her word against mine), and even people who pride themselves in their honesty will either take their chances with perdition or convince themselves that their lies are true.”).

⁵ Much of this Article is framed as a critique on juror ability to assess credibility. Similar concerns attach in bench trials, however, where trial judges sit in the role of fact-finder.

⁶ See, e.g., Uviller, *supra* note 2, at 824–25 (noting that in one study most judges polled believed juries reached the factually correct verdict in an overwhelming majority of cases).

reliability assessments. The system then insulates those assessments in a discourse of reliability that makes post-trial attacks difficult.⁷

In a troubling rebuff, however, to the popular narrative, studies show that the cues jurors look to when assessing credibility are actually the wrong ones. This Article seeks to lay bare the fiction that most firsthand observers are well-suited to make credibility assessments. There are many legitimate reasons why jurors, as first level fact-finders, are entitled to principal responsibility for credibility assessments. And there are abundant rationales for affording deference to their findings. Reliability, however, is not one of them.⁸ Studies increasingly show that without additional guidance, jurors are fairly poor evaluators of witness deception. The time has come to take those findings seriously. If a primary function of criminal trials is to make accurate determinations of guilt,⁹ the integrity of the system requires honesty about what motivates our deference to trial level credibility assessments. Only then will it be possible to tweak the system to help ensure fairer outcomes.

In Part II, this Article examines the historic development of the jury as lie detector both in the courts and in our popular conscience. Part II concludes that the current dependence on jurors as reliable

⁷ This Article focuses entirely upon modifications that might be made at the trial level to improve the reliability of outcomes. I reserve for a later date a discussion of potential modifications to the appellate system—like universal adoption of weight of the evidence review—that might better correct faulty trial assessments after they have occurred.

⁸ A variety of theories have been posited to explain why we are not particularly good at lie detection. These explanations include theories of evolution (“[O]ur ancestral environment did not prepare us to be astute lie catchers”), parental deception (“[Parental] privacy may often require that they mislead their children about just what they are doing.”), the drudgery of a constantly suspicious life (“It is only the paranoid who foregoes such peace of mind, and those whose lives are actually at some risk if they are not constantly alert to betrayal.”), and the willing collusion of the target (“Most of us operate on the unwritten principle of postponing having to confront anything that is very unpleasant, and we may do so by collusively overlooking a liar’s mistakes.”). For a fuller discussion, see PAUL EKMAN, *TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS AND MARRIAGE* (Norton & Company, New York 2009) at 341–43.

⁹ In the late 1960s, Professor Herbert Packer articulated two theoretical models for the criminal justice system. Under the first—the Crime Control Model—speed and certitude were most important. Under the second—the Due Process Model—fairness was the coin of the realm. HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 154–73 (1968). Under both models, however, there can be little question that accuracy should be the dominant goal. See David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let’s Give Science a Chance*, 89 OR. L. REV. 263, 302–03 (2010) (“Implicit in both models is the reliable judicial separation of the guilty from the truly innocent.”).

detectors of truth is a relatively new construct. In Part III, this Article discusses the growing body of empirical evidence finding that juries are not particularly well-suited to make credibility assessments. Part III also explores the substantial problems that inaccurate witness credibility assessments create. Finally, in Part IV, this Article suggests that, to avoid erroneous jury determinations of witness credibility, modification of the system should be considered.

To be clear, this Article's primary mission is to identify the problem and suggest some possible ways we might begin to address it. This piece does not propose radical overhaul of the existing criminal trial system. Nor does it recommend abandoning the role of the jury as first-level fact-finder. Indeed, I do not suggest that a fully satisfactory resolution of the problem is even possible given the developmental life of lie detection science. Rather, this Article is intended to begin the conversation—to identify the problem and some of the reasons for concern so that, as the science develops, we can more fully deploy an appropriate response. Put more simply, the point of this piece is to suggest that we should make whatever improvements are possible—even if those improvements are made simply by acknowledging the known unknowns. And there is reason to believe we can do even more. We can tell jurors what we do know about the behaviors that have predictive utility for lie detection. We can also give jurors more meaningful opportunities to observe witnesses, albeit within the artificial arrangement that is the witness box. Finally, we can directly confront juror skepticism to avoid distortion of credibility assessments.

II. ASSESSING CREDIBILITY: THEN AND NOW

Commentators have argued that accurate assessments of witness credibility depend upon the fact-finder's ability to observe firsthand the witness as he or she is speaking.¹⁰ Justice Brennan once noted "there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"¹¹ But the notion that jurors are (and should be) the ultimate judges of truth telling is a fairly modern one, born out of the dual needs for finality and legitimacy. It was not always the case that jurors were viewed as peculiarly well-situated to make credibility calls. Assessment of criminal culpability was once made by ordeals that

¹⁰ Hon. James Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903 (2000).

¹¹ *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

claimed results of divine judgment. It was only over the course of several centuries that a system that anchored its legitimacy first in God and then in the oath gradually evolved into one that is anchored in the jury's ability to recognize candor.

A. *A Slow Conversion from Trial by Fire to Trial by Jury*

Prior to reliance on jury trials, trial by ordeal was the favored method of sorting guilt and innocence.¹² There were two primary ordeals used to assess guilt.¹³ The first was the ordeal by cold water.¹⁴ A second ordeal—trial by fire—involved the infliction of burns on the hands of the accused with a hot iron.¹⁵ The popularity of these trials by ordeal rested on the notion that one's culpability was being judged by God.¹⁶

In 1215, however, trials by ordeal came to an abrupt end when the Catholic Church prohibited priests from presiding over future ordeals.¹⁷ The exclusion of priests stripped the ordeals of their ostensible divine authority and, consequently, eroded their popular appeal.¹⁸ Concomitant with the demise of the ordeal, European countries began adopting "rational" Roman-canon methods of proof that placed great faith in sworn eyewitness testimony and confessions

¹² George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 585–86 (1997).

¹³ See Margaret H. Kerr, Richard D. Forsyth & Michael J. Plyley, *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 J. INTERDISC. HIST. 573, 573 (1992), for a historical review of the ordeals.

¹⁴ With trial by cold water, the accused was stripped and lowered into a 12-foot deep pool of water with his hands bound. If the accused sank, he was deemed innocent—the theory being that the water, which was pure, had accepted him. If the accused floated, he had been "rejected" by the water, and was adjudged guilty. *Id.* at 582–83.

¹⁵ With trial by fire, burns were inflicted on the palm with a hot iron. The wound was then bandaged. Several days later, the bandages were removed. If the burns were healing well, the accused was declared innocent. If the injuries were infected however, it was a sign from God and the accused was deemed guilty. *Id.* at 588.

¹⁶ Rebecca V. Colman, *Reason and Unreason in Early Medieval Law*, 4 J. INTERDISC. HIST. 571, 582 (1974). As scholars have rightly noted, however, despite the common construction of the ordeal as producing a divine mandate, the outcome was a product of human judgment. A human intermediary was the judge of whether a burn healed cleanly; of whether a body sunk or floated. "The institutional brilliance of the ordeal was that it so neatly merged the appearance of divine judgment with the reality of a great measure of human control." Fisher, *supra* note 12, at 601.

¹⁷ W.G. Aitchison Robertson, *Trial by Ordeal*, 38 JURID. REV. 70, 78 (1926) (noting that the Lateran Council forbade the clergy from participating in trials by ordeal).

¹⁸ See Fisher, *supra* note 12, at 586–87.

by the accused.¹⁹

By 1220, these two developments produced the first documented criminal jury trial in England. But general views about jury competency at that time were only a distant cousin to our current conceptions. Public acceptance of such trials was far from immediate, for the trials lacked the ostensible divine sanction of the ordeal.²⁰ To address this concern, tribunals sought the consent of the accused. Consent, however, was a poor substitute for divine legitimacy where such consent was frequently obtained by either harsh imprisonment (the *prisone forte et dure*), or tortuous punishment (the *peine forte et dure*).²¹ A plausible claim that the new judgments were anchored in some superior form of decision making was needed if jury trials were to garner the broad social acceptance previously afforded trials by ordeal.

Reliance upon the law initially provided the superior form of decision making. As Charles Donahue said, it was critical that the “ultimate decision of the case not be within human discretion but be dictated by the rules of law. People might accept a judgment of the law rather than a judgment of God; it was less likely that they would accept a judgment of man rather than one of God.”²² Thus, after the fall of the ordeal, the rule of law initially provided the system’s legitimacy. Divine sanction, however, eventually returned as a central

¹⁹ Richard Fraher, *Conviction According to Conscience: The Medieval Jurists’ Debate Concerning Judicial Discretion and the Law of Proof*, 7 LAW & HIST. REV. 23, 24 (1989); see also JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 4 (Univ. of Chi. Press 1977).

²⁰ In his 1997 piece in the Yale Law Journal, George Fisher postulated that the popularity of the ordeal was the “apparent intervention of God.” Fisher, *supra* note 12, at 587 (“The old system of trial by ordeal bespoke a social humility, an unwillingness to take life or limb without divine sanction.”). The shift from divine judgment to human judgment, scholars have hypothesized, is what drove early skepticism of jury trials. As Fisher readily acknowledges, however, there is scholarly disagreement whether widespread opposition to human judgments really existed. See, e.g., Fraher, *supra* note 19, at 56–62 (arguing that in practice, there was a great deal of discretion in the system, the existence of which provides proof that there was confidence in human judgments). As Fisher notes, however, where the system publicly proclaimed strict application of legal rules, evidence of discretion in practice may be proof only of institutional (not public) acceptance of human judgment. Fisher, *supra* note 12, at 590 n.39.

²¹ Fisher, *supra* note 12, at 588 (explaining that defendants were coerced into consenting by *prisone et dure*, which was later replaced by *peine forte et dure*).

²² Charles Donahue, Jr., *Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law*, in ON THE LAW AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 127, 133 (Morris S. Arnold et al. eds., 1981), available at <http://www.law.harvard.edu/faculty/cdonahue/writings/FsThorne127f.pdf>.

guarantor of the system in the form of the oath.²³ While there is some dispute about the precise timing of this second evolution,²⁴ by the middle of the fifteenth century the evidence of sworn witnesses had become a foundational part of the system.²⁵

Significantly, accepting a witness's sworn testimony for jury assessment did not yet signal confidence in the jury's abilities. It was the oath, not the jury, that was seen as the central guarantor of truth telling. Significant steps were taken, therefore, to maintain the perceived legitimacy of the oath. For example, to avoid embarrassing challenges to the notion that the oath functioned as an iron-clad guarantee of truthfulness, rules that permitted only the prosecution to call witnesses helped avoid credibility contests.²⁶ Rules on witness competence and racial exclusion laws also limited those who were qualified to give sworn testimony.²⁷ By limiting testimony, the rules necessarily limited the opportunities for credibility battles. Other rules, like the Rule in Bethel's Case²⁸ and the evidentiary premise on

²³ Fisher, *supra* note 12, at 591, 594. Whether law completely supplanted God or rather was only a means by which divine sanction was retained, there is certainly agreement that the current formula for jury trials was not a deliberate institutional strategy. ("[G]radually and over time, the institutions of justice gravitated toward a formula for the jury trial that permitted the system to reassert its old claim to divine legitimacy.").

²⁴ It is generally acknowledged that for the first hundred years or so, the divine legitimacy of jury trials was far from a settled question. Compare Fisher, *supra* note 12, at 595, with Langbein, *supra* note 19, at 78. It also appears that there is no clear historical explanation for the decision to settle upon the oath as the source of divine legitimacy. See generally, Fisher, *supra* note 12, at 591 n.43.

²⁵ Fisher, *supra* note 12, at 595; see also *Press-Enterprise Co. v. Riverside Cnty.*, 464 U.S. 501 506 (1984) ("[D]uring the fourteenth and fifteenth centuries, the jury became an impartial trier of fact.").

²⁶ Fisher, *supra* note 12, at 583 (arguing that allowing only the prosecution to call witnesses made the oath more credible).

²⁷ Under these rules, criminal defendants, spouses, convicted felons, anyone with a monetary stake in a case, atheists, and disfavored racial minorities were all barred from testifying. JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 679–80 (3d ed. 1940); see generally James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 LAW & HIST. REV. 95, 107–17 (1994). By limiting those who were qualified to give sworn testimony, the rules necessarily limited the opportunities for credibility battles.

²⁸ Bethel, a candidate for Parliament, had been charged with assault and battery for hitting one of the King's servants outside of a polling place. At trial, the prosecution presented the sworn testimony of six witnesses. Bethel, who was entitled to call sworn witnesses on his own behalf because the charge was a misdemeanor called five witnesses. Each of the prosecution's witnesses testified they saw the blow. Each of the defense witnesses testified they had not seen a blow. In closing argument, the prosecutor urged the jury to conclude that the defense witnesses were "mistaken (or inattentive) before concluding that [they] had lied." Fisher, *supra*

“positive” evidence²⁹ also limited the jury’s ability to resolve pure credibility contests. But these rules (and others like them) eventually eroded.

The erosion, however, was gradual. Only little by little did rules develop that undermined the limitations on witness qualification. Allowing an accused’s sworn testimony was one such erosion. The increasing acceptance of alibi evidence was another.³⁰ Diminution in the perceived value of the oath also occurred as non-Christian witnesses were increasingly tolerated.³¹

Despite increased opportunities for jurors to be presented with conflicting oaths, however, the system was still unwilling to submit completely to the jury the task of credibility assessment. Competency rules and racial exclusion laws survived—shielding jurors from the full brunt of the task of divining truth. Other evidentiary guidelines also persisted. For example, well into the nineteenth century, juries faced with irreconcilable conflicts between sworn witnesses were

note 12, at 627. The Rule in Bethel’s Case thus encouraged jurors who were presented with conflicting sworn testimony to reconcile any differences rather than reject one version of testimony taken under oath. Often this was done by encouraging jurors to characterize a witness as merely mistaken. According to scholars who have closely studied the question, the theory underlying the Rule in Bethel’s Case pre-dates Bethel’s 1681 trial. Documentation confirming this fact has proven difficult to locate, however. *Id.* The Rule in Bethel’s Case received broad acceptance when the preeminent turn-of-the-century evidence treatise provided an extended discussion of the case. In that treatise, the rule was explained as necessary to the continued validity of a presumption that all oaths are true. See JEFFREY GILBERT, *THE LAW OF EVIDENCE* 156 (London, Henry Lintot 1756).

²⁹ When imported into the United States, the concept of “mistaken” testimony embedded in the Rule in Bethel’s Case took root, and the Rule increasingly became utilized as an evidentiary premise regarding “positive” and “negative” evidence. See, e.g., *Stitt v. Huidekopers*, 84 U.S. (17 Wall.) 384, 394 (1873) (affirming a jury instruction that positive evidence should be preferred over negative evidence because a witness presenting negative evidence “may have forgotten”); *State v. Smith*, 222 S.W. 455, 459 (1920).

³⁰ Fisher, *supra*, note 12, at 650–56.

³¹ An Act That the Solemn Affirmation and Declaration of the People Called Quakers, Shall Be Accepted Instead of an Oath in the Usual Form, 7 & 8 Will. 3, c. 34 (1696) (allowing Quakers to testify in civil cases); An Act for Amending the Law of Evidence in Certain Cases, 9 Geo. 4, c. 32 (1828) (allowing Quakers to testify in criminal cases); *Omichund v. Barker*, Y.B 18 Geo. 2, Hil. 1 (Ch 1744), *all reprinted in* REPORTS OF ADJUDGED CASES IN THE COURT OF COMMON PLEAS DURING THE TIME LORD CHIEF JUSTICE WILLES PRESIDED IN THAT COURT; TOGETHER WITH SOME FEW CASES OF THE SAME PERIOD DETERMINED IN THE HOUSE OF LORDS, COURT OF CHANCERY, AND EXCHEQUER CHAMBER (Durnford) 538 (London, John Exshaw 1800). As some scholars have noted, the increased tolerance of non-Christian witnesses may say more about increased religious tolerance than about the declining value of the oath.

guided by the number of witnesses on each side.³² Jurors' ability to engage credibility contests was also constrained by the rule of *falsus in uno, falsus in omnibus*, which was endorsed by the Supreme Court as late as 1822. The rule, mandatory at its inception, instructed jurors to reject the entire testimony of a witness who was proven to have lied about any portion therein.³³

But the trend toward fully allowing juries to resolve credibility contests was growing. The collapse of competency rules began in earnest in the mid-1800s.³⁴ And by 1881, most states and the federal government had abolished their ban on civil party testimony.³⁵ The

³² See *Coles v. Perry*, 7 Tex. 109, 140 (1851), *Vaughan v. Parry*, 20 Ark. 600, 607 (1859); see also, e.g., William David Evans, *On the Law of Evidence*, Appendix XVI to M. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS 262 (William David Evans ed., London, A. Strahan 1806); THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE §§ LII, LV, LVIII (Boston, Wells & Lilly 1826); for a fuller discussion of the history and development of the numerical system of witnesses, see John H. Wigmore, *Required Numbers of Witnesses: A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83 (1901).

³³ 3 WIGMORE, *supra* note 27, at 1010; see also *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 339 (1822) (endorsing articulation of a mandatory construction of the rule); *Pass v. State*, 182 S.E.2d 779, 788 (Ga. 1971).

³⁴ See, e.g., An Act for the Regulation of Civil Actions (codified at CONN. REV. STAT. tit. I, ch.X, § 141 (1849)) (reflecting Connecticut's statutory acceptance of party testimony in civil cases). In 1846, two years prior to the passage of the Connecticut law, interested witnesses were allowed to testify in Michigan. Joel Bodansky, *The Abolition of the Party Witness Disqualification: A Historical Survey*, 70 KY. L. J. 91, 93 (1981). Three years after the ban was lifted in Connecticut, civil parties in England gained the right to present evidence. See An Act to Amend the Law of Evidence, 1851, 14 & 15 Vict., c. 99 § 2 (Eng.). Within a decade, back on this side of the Atlantic, several states quickly passed laws permitting parties to testify. The first fourteen states to permit parties to testify in civil cases were: Connecticut (1848); Vermont (1852); Ohio (1853); Maine (1856); Rhode Island (1857); Mississippi (1857); New York (1857); Massachusetts (1857); New Hampshire (1857); Kansas (1858); New Jersey (1959); Michigan (1861); and Indiana (1861). See Fisher, *supra* note 12, at 669. As a quick review of the list reflects, Mississippi was the only southern state among this group to abolish civil competency rules early on.

³⁵ The federal government abolished its ban on civil party testimony in 1864 as a result of efforts that also outlawed the exclusion of black witnesses. See CONG. GLOBE, 38th CONG., 1st SESS. 3260–61 (1864). By 1881, the additional states to permit parties to testify in civil cases were: Oregon (1862); California (1863); Maryland (1864); Florida (1866); Virginia (1866); North Carolina (1866); South Carolina (1866); Georgia (1866); Missouri (1866); Alabama (1867); Illinois (1867); Louisiana (1867); West Virginia (1868); Tennessee (1868); Pennsylvania (1869); Texas (1871); Kentucky (1872); Arkansas (1874); and Delaware (1881). See Fisher, *supra* note 12, at 669. As a quick review of this list suggests, many more southern states were in this latter group. By way of explanation for the lag in the South, scholars have noted that among states with racial exclusion laws, the overwhelming majority abolished their racial exclusion laws at the same time or shortly before abolishing their civil competency laws. Indeed just three states abolished their racial exclusion laws *before*

demise of other limitations on witness competence soon followed.

Though somewhat beyond the scope of this Article, it does bear brief mention that the emerging American willingness to accept sworn testimony from parties (civil and criminal alike) was not driven exclusively by growing acceptance of the jury's aptitude for divining truth. Rather, the expansion of sworn testimony was, at least in part, a response to the brewing national debate regarding the legal status of American blacks.³⁶ In the lead up to and immediately following the Civil War, racial exclusion laws in particular—and competency laws by association—became contentious issues.³⁷ Roughly

abolishing their civil competency laws. Noting this trend, at least one scholar has opined that the demise of civil competency rules in the South was more closely related to the victory of the Union in 1865 than to the region's wholesale adoption of the transatlantic trend toward liberalized civil competency rules. As Fisher hypothesized, the South had little reason to resist the fall of competency rules after its defeat in the Civil War (and the commiserate demise of racial exclusion laws). Fisher, *supra* note 12, 671–74. Indeed, as Fisher suggests, with the fall of racial exclusion laws, there may have been a sense of increased urgency in permitting parties in civil cases to testify. This is because the absence of racial exclusion created the potential for results that could not be reconciled with the South's racial caste system. For example, in the absence of racial exclusion, a black witness would be allowed to testify against a white party who was forced to sit silent under a civil competency bar.

³⁶ As scholars have noted, the early demise of competency rules in the North was in no small part motivated by northern political attacks on the South's exclusion of non-whites as witnesses. In an effort to anchor their claims in something more than bald claims of racism, northern opponents in the U.S. Congress cast their opposition to the southern rules in non-racial terms, and suggested that all competency rules were a hindrance to the full development of the factual record. During the Civil War and early Reconstruction periods, the most divisive human rights issues were slavery, racial exclusion laws, and the right of black Americans to vote. Fisher, *supra* note 12, at 675. Though little could be done at a federal level on the first and third items until the end of the war, the senatorial debates of the period did result in legislation that liberalized civil competency rules and rejected racial exclusion laws in federal courts. It was not until the additional leverage afforded by a northern victory, however, that the balance of the agenda was addressed in earnest. At the close of the Civil War, the abolition of slavery was generally accepted as a necessary pre-condition to a seceded state's readmission into the Union. Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 *FORDHAM L. REV.* 153, 205 n.241 (2004); see also Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 *AM. J. LEGAL HIST.* 119, 143–44, 150 (2004). The abolition of racial exclusion laws was also seen as a desirable pre-requisite. Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 *NW. U. L. REV.* 477, 548 (1998). In contrast, the remaining issue of the day—the right of black Americans to vote—did not garner similar support. *The Progress of Reconstruction*, *N.Y. TIMES* (Oct. 3, 1865), available at <http://www.nytimes.com/1865/10/03/news/the-progress-of-reconstruction.html>.

³⁷ For a detailed accounting of the North-South battle over racial exclusion laws,

concurrent to (and in some instances simultaneous with) expansions in competency rules came the fall of racial exclusion laws in the States.³⁸ Each new development pushed the jury further and further toward its now central role of assessing witness credibility.

In the late 1800's, American courts began, for the first time, to clearly express the view that the jury was the appropriate institution to assess credibility.³⁹ By the early 1900s, the Georgia Supreme Court found "[c]redibility is also essentially involved. . . . [t]he jury [is to] consider not only what a witness swears, but also what credit is to be given him as a witness."⁴⁰ Other courts soon followed.⁴¹

It was in this manner that historic developments, over the course of centuries, eventually removed the substantial barriers that once

see generally Fisher, *supra* note 12, at 676–96. The full explanation for the demise of competency rules, however, cannot be provided by pointing only to racial politics in America around the time of the Civil War. As noted, in England, competency rules began to erode in the mid-1800s; and in the United States, erosion began in the civil arena as early as 1846. Casting about for other explanations, some look to Bentham's work, *Rationale of Judicial Evidence*, as a factor in the shift. *See* Fisher, *supra* note 12, at 659. *But see* BARBARA SHAPIRO, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE* 241 (1991); C.J.W. Allen, *Bentham and the Abolition of Incompetency from Defect of Religious Principle*, 16 *LEGAL HIST.* 172, 185 (1995). Published in 1827, *Rationale* argued that reliance on the oath as a guarantor of truth was ill-advised. Alternatively, some have suggested that the increased presence of lawyers in the courtroom—and thereby the increased use of cross-examination—led in part to the demise of competency rules. *See* John Langbein, *The Criminal Trial Before the Lawyers*, 45 *U. CHI. L. REV.* 263, 264–65 (1978). Finally, some have suggested that the 1820s and 1830s saw the success of the Jacksonian common citizen. This success, the theory goes, led to the enhanced power of the jury in the 1840s and 1850s. *See* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 362 (New York, The Century Co. 1898). As scholars correctly note, though, de Tocqueville's argument does not explain the demise of English competency rule. Beyond witness exclusion, a number of scholars have observed more broadly the complex relationship between racial attitudes and rules of criminal procedure. *See, e.g.,* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press 2010).

³⁸ The simultaneous fall of racial exclusion and competency laws in many southern States appears to have been motivated by a view that it would be unseemly to have blacks testify against whites who were barred from speaking as a result of competency rules. *See, e.g., Our Sumter Correspondence*, *CHARLESTON DAILY COURIER*, 4 (Sept. 5, 1866); *see also* An Act to Protect Freedmen in Their Rights of Person and Property in This State, No. 86, 1866 Ala. Acts 98 (adopted Dec. 9, 1865) (recognizing the right of parties to testify when cross-racial testimony was expected).

³⁹ Scholar George Fisher has identified *Humphries v. State*, 100 Ga. 260 (1896) as the first case to clearly and completely assign the task of "lie detection" to the jury. Fisher, *supra* note 12, at 638 n.276.

⁴⁰ *Warrick v. Georgia*, 125 Ga. 133, 141–42 (1906).

⁴¹ *State v. Taylor*, 261 Mo. 210, 229 (1914) ("Here the weight of the evidence and the credibility of the witnesses were wholly for the triers of fact and not for us as soon as the verdict of the jury met the approval of the trial court.").

shielded the jury from squarely evaluating credibility. The continued discomfort with jurors' abilities to meet the task before them, however, lingered well into the modern day. In the late nineteenth century, contemporary jury instructions continued to guide juries in the evaluation of ostensibly questionable sworn testimony.⁴² More recently, legal norms limited a jury's ability to convict when presented with testimony deemed generally unreliable. For example, though no longer the law in any state, for many years, uncorroborated accomplice testimony was insufficient to sustain a conviction.⁴³ Presumably in a similar vein, a rape victim's testimony required corroboration.⁴⁴ Over time, however, even the remaining rules met a death of attrition as only a minority of jurisdictions, if any, still embraced them. As with the demise of earlier rules, this erosion marked the near complete rise of the jury as a lie detector. Commenting on the transition, scholar George Fisher noted:

The jury . . . promised a remarkably reliable source of systemic legitimacy. Its usually private and inarticulate decisionmaking protected it from the sort of embarrassing public failures that so regularly threatened the oath. Although two oaths all too easily could conflict, the jury's verdict stood alone and, at least within the system's formal bounds, was almost immune from contradiction. Moreover, whether by tradition or conscious design, the jury's verdict has been largely impenetrable. . . . The jury's secrecy is an aid to legitimacy, for the privacy of the jury box shrouds the shortcomings of its methods.⁴⁵

So it was that the jury replaced the divine sanction of the ordeal as a guarantor of the system's legitimacy. Once enthroned, the authority of the system required that we embrace the jury as the

⁴² See, e.g., *People v. Morrow*, 60 Cal. 142, 147 (1882) (approving an instruction regarding the defendant's testimony that called the jury's attention to the potential consequences to the defendant of an adverse trial result); *State v. Maguire*, 69 Mo. 197, 201–02 (1878) (approving an instruction informing the jury it could consider "the fact that [the defendant] is a witness testifying in his own behalf"); *St. Louis v. State*, 8 Neb. 405, 418–19 (1879) (same).

⁴³ Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 790–91 nn.40–41 (1990); see also Kevin Jon Heller, Note, *What Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and United States v. Shabani*, 49 STAN. L. REV. 111, 121–26 (1996).

⁴⁴ 7 WIGMORE, *supra* note 27, at 2062; see generally Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1367–68 (1972); Irving Younger, *The Requirement of Corroboration in Prosecution in Sex Offenses in New York*, 40 FORDHAM L. REV. 263, 265 (1971); *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967).

⁴⁵ Fisher, *supra* note 12, at 705.

rightful heir. Commenting on early twentieth century juries, Edson Sunderland observed that they are a “procedural opiate” that “soothes us in the assurance that we have attained the unattainable. Because it emits no light, the black box of the jury room has become the system’s black hole, drawing into itself all of the questions of fact for which the system needs an unquestionable answer.”⁴⁶

B. An Enthusiastic Embrace of the New Paradigm

After anointing this new guarantor of system legitimacy, the apparatus of the revamped criminal justice system then quickly crafted a narrative to encourage jurors to relish their new role. As early as the sixteenth century, legal commentators touted the advantage of hearing testimony from the witness’s own mouth.⁴⁷ In the modern era, popular culture routinely endorses the notion of human lie detectors. Well-respected commentators also regularly applaud the ability of jurors to make credibility assessments. And virtually every state in the nation promotes a pattern jury instruction that encourages jurors to use their “natural” powers of observation to assess credibility. We are awash in a modern narrative that is fascinated with the ability to detect lies, a narrative that encourages the belief that human beings can make reliable credibility assessments based largely on the demeanor of the witness.

Using demeanor evidence is just one tool the jury has at its disposal. There are other ways to judge credibility. Capacity, bias, consistency, corroboration, plausibility, and (in the trial setting) certain character evidence are also factors that can and should be considered.⁴⁸ But it is the jury’s use of demeanor evidence that is the most flawed. It is also the factor that is most often the focus of

⁴⁶ Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253 (1920); see also Uviller, *supra* note 2, at 827 (“Just because the system works in the sense that juries do deliver the unanimous verdicts demanded of them with a fair degree of regularity, and in the sense that trial judges more often than not would have voted as their juries did, does not mean that the system works in the sense that verdicts correspond to historical fact with an acceptably high degree of certainty.”).

⁴⁷ The Supreme Court has noted that in the early days of jury trials, little other than the indictment was submitted in writing. “All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so many as will or can come so neare as to heare it, and all depositions and witnesses given aloud, that all men may heare from the mouth of the depositors and witnesses what is saide.” *Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 507 (1984) (citation omitted).

⁴⁸ Some studies indicate that trial judges, when sitting as fact-finder, rely upon prior inconsistencies and contradictions within testimony most often when assessing credibility. Demeanor is the factor relied upon most thereafter. Uviller, *supra* note 2, at 825.

popular culture. As bestselling novels and popular television shows reflect, we are deeply intrigued by the notion that demeanor is a reliable indicator of deception. Sometimes, the constructed narrative attributes the ability to the superhuman.⁴⁹ But, more often, popular fiction imbues mere mortals with a super-intuitive ability to sense prevarication.

In the Season One opener to the hit television show *Scandal*, the lead character, Olivia Pope, is asked to manage a public relations disaster for a fictionalized U.S. president.⁵⁰ The president, who has been threatened by a spurned lover with public revelation of their affair, asks Pope's crisis-management team to make the allegations go away.⁵¹ The president's people assure Pope that he has denied the affair.⁵² Before taking the case, however, Pope tells the president's aide, "You want me to shut her down? Then I need to look him in the eye and know he's not lying."⁵³

In another episode, Pope and her team have just met with a potential client and heard him vehemently deny using a prostitute's services.⁵⁴ Pope is asked to assess the man's veracity.⁵⁵ "What does your gut say," her colleague inquires.⁵⁶ Pope announces confidently, "He's not a hooker guy or a liar. If he says he's never heard of Stacy, I believe him."⁵⁷ Indeed, "I know it in my gut," is one of the series's most oft-used exhortations—signifying the confidence that Pope and her colleagues have in their assessments of truthfulness. *Scandal* is not alone in its adoration of lie-detecting mortals. A similar ability to detect truth was the talent of lead characters in shows ranging from *Lie to Me* to *The Closer* to *The Mentalist* to *Curb Your Enthusiasm*.

⁴⁹ In *Breaking Dawn*, the popular conclusion to the young adult *Twilight* saga, the author describes two vampires with the unique ability to accurately discern when they are being lied to. See STEPHANIE MEYER, *BREAKING DAWN* 609 (Little Brown & Co. 2008) ("Little Maggie, with her bouncy red curls, was not physically imposing like the other two, but she had a gift for knowing when she was being lied to, and her verdicts were never contested."); *id.* at 721 ("It is not what I see, but what I feel," [Charles said] in a high, nervous voice. He glanced at Garrett. "Garrett said they have ways of knowing lies. I, too, know when I am hearing the truth, and when I am not.").

⁵⁰ *Scandal: Sweet Baby* (ABC broadcast Apr. 5, 2012).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Scandal: Dirty Little Secrets* (ABC broadcast Apr. 12, 2012).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

It is not just the superhuman leads of popular teen-lit and the uniquely-intuitive of nighttime television dramas that get in on the game. Popular culture regularly communicates that the ability to “lie detect” is within each of our capacities.⁵⁸ Every one of us, the theory goes, is capable of divining truth if we just look hard enough. For example, in the December 2010 issue of the magazine, *Real Simple*, readers were advised that simply by paying better attention, they could reliably calculate the veracity of a speaker.⁵⁹ Under the caption “Reading Faces,” readers were told that nose scratching and intense gazes are both indicators of deception, but the conveyed wisdom did not end there.⁶⁰ If a speaker is recalling something she has seen, readers were advised, she “will angle her eyes skyward, as if to picture it.”⁶¹ Similar advice was given with regard to observed body language—if the speaker holds his hands in his lap, puts them in his pockets or holds them behind his back these are “movements of deceit—[he’s] hiding something.”⁶² During the Jodi Arrias trial in 2013, media outlets regularly consulted experts to scrutinize witnesses’ body language for indications of deceit. Commenting after Arrias’s time on the stand, one expert told readers, “Jodi gives every sign of being a sociopath who can lie easily and be detached while describing her feelings, and then snap and strike out with extreme rage as she clearly did in murdering Travis.”⁶³

Admittedly, the pervasive modern message that we are all able to detect liars is neither particularly original nor confined to popular media. More than two centuries ago, literary giant Victor Hugo advised readers that a calm countenance was evidence of honesty.

⁵⁸ Not surprisingly, their role as lie detector is not the exclusive attribute for which modern juries are championed. Discussing the power of jury nullification, scholar Paul Butler has argued, “[O]rdinary citizens, not government officials, should have the final say as to whether a person should be punished.” Paul Butler, *Jurors Need to Know That They Can Say No*, N.Y. TIMES, Dec. 20, 2011, at A39; see also P. Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Both conceptions of the jury are premised upon confidence in that institution’s decision-making ability.

⁵⁹ Sarah Smith, *What is Your Body Language Saying?*, REAL SIMPLE, <http://www.realsimple.com/health/mind-mood/reading-body-language-00000000048262/> (last visited Jan. 27, 2013).

⁶⁰ *Id.* As noted in Part III, *infra*, the claims in the article require, at minimum, greater qualification to make them supportable by the existing scientific data.

⁶¹ *Id.*

⁶² *Id.*

⁶³ David Lohr, *Jodi Arias’ Testimony Analyzed by Experts*, HUFFINGTON POST (Feb. 10, 2013) http://www.huffingtonpost.com/2013/02/10/jodi-arias-testimony_n_2646928.html.

Writing of his tragic lead, Jean Valjean, Hugo wrote, “Maurius looked at this man. He was grim and tranquil. No lie could possibly emerge from such calm. What is ice-cold is sincere. You could feel the truth in this coldness of the grave.”⁶⁴

More than a century later the message that demeanor is an important clue to truthfulness persisted. Writing for the court in the early 1950s, Judge Learned Hand explained as follows:

[A] jury . . . may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. . . . [S]uch evidence may satisfy the tribunal, not only that the witness’ testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.⁶⁵

Judge Hand’s sentiment is frequently echoed by modern jurists. In the early 1980s, the Supreme Court declared that jurors as fact-finders were entitled to “formulate[] certain common sense conclusions about human behavior.”⁶⁶ Similarly, the Chief Administrative Judge for the Federal Trade Commission has voiced support for the belief that “[d]emeanor evidence requires fact-finders to use their ‘natural and acquired shrewdness’ and experience to assess demeanor and credibility.”⁶⁷

Similarly, pattern jury instructions in virtually every state authorize jurors’ use of demeanor evidence to detect prevarication.⁶⁸

⁶⁴ VICTOR HUGO, *LES MISERABLES* 1139 (Julie Rose Translation 2009).

⁶⁵ *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952).

⁶⁶ *United States v. Cortez*, 449 U.S. 411, 418 (1981).

⁶⁷ Timony, *supra* note 10, at 920.

⁶⁸ Arizona: RAJI (Criminal) 3d Preliminary Crim. 10 Credibility of Witnesses. Arkansas: Ark. Model Jury Instr., Crim. AMCI 2d 103 Personal Observations and Experiences; Ark. Model Jury Instr., Crim. AMCI 2d 104 Credibility of Witnesses. California: Cal. Jury Instr., 1-200 CALCRIM 226 (Apr. 2008) Witnesses; Cal. Jury Instr., CA CALJIC 2.20 (Sept. 2012) Witnesses Generally. Colorado: 3:06: Credibility of Witnesses, Colo. Jury Instr., Criminal (1993). Connecticut: 5 Conn. Prac., Crim. Jury Instr. §1.4 Function of Jury (4th ed.); 5 Conn. Prac., Crim. Jury Instr. §2.1 Roles of court, counsel, and jury (4th ed.); 5 Conn. Prac., Crim. Jury Instr. §3.2 Credibility (4th ed.); 5 Conn. Prac., Crim. Jury Instr. §3.13 Expert Testimony (4th ed.); 5 Conn. Prac., Crim. Jury Instr. §3.4 Accepting truth of testimony (4th ed.). Delaware: Del. P.J.I. Crim. §2.7 Credibility of Witnesses; Del. P.J.I. Crim. §2.9 Conflicts in Testimony; Del. P.J.I. Crim. §4.16 Testimony of a Child Witness. District of Columbia: 1-II Crim. Jury Instr. D.C. Instr. 2.200 Credibility of Witness. Florida: Fla. Stand. Jury Instr. Crim. Cases §3.9 Weighing the Evidence. Georgia: 2 Ga. Jury Instr., Crim. §0.01.00 Preliminary Jury Instructions; GAJICRIM 1.41.11, Ga. Suggested Pattern Jury Instr.

(Jan. 2013) No Presumption of Criminal Intent; GAJICRIM 1.31.10, Ga. Suggested Pattern Jury Instr. (Jan. 2013) Credibility of Witnesses; 2 Ga. Jury Instr., Crim. §3.90.10 Insanity: Special Plea Trial Contentions of Movant. Hawaii: HA.CR.JI Instr. No. 3.08 Weight of the Evidence; HA.CR.JI Instr. No. 3.09 Credibility and Weight of Testimony. Idaho: Idaho Crim. Jury Instr., ICJI 104 Trial Procedure & Evidence; Illinois: IL-IPICRIM 1.02, Ill. Pattern Jury Instr.—Crim. 1.02 (4th ed.) Jury is Sole Judge of the Believability of Witnesses; Indiana: 1-1 Ind. Pattern Jury Instr. Crim. Instr. No. 1.17 Credibility of Witnesses-Weighing Evidence. Iowa: Iowa Crim. Jury Instr. 100.7 Credibility Of Witnesses (2004); Iowa Crim. Jury Instr. 200.37 Expert Witness (2004). Kansas: 50.020 Instructions before Intro. Of Evidence, Kan. Judicial Council PIK—Crim. Advisory Comm. (Nov. 2012); 51.060 Credibility of Witnesses, Kan. Judicial Council PIK—Crim. Advisory Comm. (Nov. 2012); 51.110 Eyewitnesses Identification, Kan. Judicial Council PIK—Crim. Advisory Comm. (Nov. 2012). Louisiana: 17 La. Civ. L. Treatise, Crim. Jury Instr. § 3:4 Duty of jury to find facts: Evidence, weight, and credibility (3d ed.). Maryland: CRIM MD-CLE 229, MPJI-CR3:10 Credibility of Witnesses (2012). Massachusetts: Mass. Superior Ct. Crim. Practice Jury Instr. § 1.8 Credibility of Witnesses (2004); CR Model Jur. Instr. D. Cts., Mass. Instr. 2.260 Credibility of Witnesses. Maine: 1-6 Me. Jury Instr. § 6-20 Expert Witness. Instr. (2012); 1-6 Me. Jury Instr. § 6-24 Gen. Witness Eval. Instr. (2012). Michigan: § 2:51 Identification, Mich. Non-Standard Jury Instr. Crim. § 2:51 (Aug. 2012). Minnesota: 10 Minn. Prac., Jury Instr. Guides—Crim., CRIMJIG 1.02A Instruction to the Jury before Trial Begins (5th ed.); 10 Minn. Prac., Jury Instr. Guides—Crim., CRIMJIG 3.12 Evaluation of Testimony-Believability of Witnesses (5th ed.); 10 Minn. Prac., Jury Instr. Guides—Crim., CRIMJIG 3.19 Identification Testimony—Cautionary Instr. (5th ed.). Mississippi: § 1:2 General Instr.-Crim. Cases, Miss. Prac. Model Jury Instr. Crim. (Nov. 2012); § 1:15 Credibility of witnesses-Generally, Miss. Prac. Model Jury Instr. Crim. (Nov. 2012). Nebraska: NJI2d Crim. 1.0 Function of Judge, Jury, Counsel, Evidence, 1 Neb. Prac. (2010); NJI2d Crim. 5.2 Evaluation of Testimony-Credibility of Witnesses, Evidence, 1 Neb. Prac. (2010). New Jersey: NJ-JICRIM Non 2C Charges, NJ J.I. CRIM Credibility of Witnesses (Nov. 2003). New Mexico: New Mexico UJI 14-5020 Credibility of witnesses; New Mexico UJI 14-101 Explanation of trial procedure. Note taking permitted. New York: § 4:41 Credibility, 1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. (Oct. 2012); § 4:83 Weighing evidence, 1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. (Oct. 2012); § 4:48 Identification 1Charges to Jury & Requests to Charge in Crim. Case in N.Y. (Oct. 2012). North Dakota: N.D. Crim. Jury Instr. K-5.04 Weight and Credibility (1998); N.D. Crim. Jury Instr. K-5.12 Opinion of Expert (2007). Ohio: 2 OJI-CR 409.05 Credibility (Aug. 2012). Oklahoma: OUJI-CR § 10-8 Credibility of Witnesses (2009); OUJI-CR § 9-1 Inferences (2009); OUJI-CR § 9-19 Eyewitness Identification (2009); OUJI-CR § 11-6 Closing Instructions (2009); OUJI-CR § 13-9 Opening Instruction (2009); OUJI-CR § 13-19 Credibility of Witnesses (2009). Oregon: UCRI No. 1005, UCRI 1006. Pennsylvania: PA-JICRIM 2.04, Pa. SSJI (Crim.), §2.04 Credibility and Weight of Evidence (Apr. 2005); PA-JICRIM 4.06, Pa. SSJI (Crim.), §4.06 Certain Testimony Subject to Special Scrutiny (2012); PA-JICRIM 4.07A, Pa. SSJI (Crim.), §4.07A Identification Testimony (Sept. 2006); PA-JICRIM 4.07B, Pa. SSJI (Crim.), §4.07B Identification Testimony-Accuracy in Doubt (May 2008); PA-JICRIM 4.17, Pa. SSJI (Crim.), §4.17 Credibility of Witness, General (Apr. 2005). Tennessee: 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim 1.00 Preliminary Jury Instr. (Sept. 2012); 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim 42.04 Credibility of witness: In general & when defendant testifying (Sept. 2012); 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim 42.04(a) Alternative Instruction: Credibility of witness (Sept. 2012). Utah: MUJI 2d CR CR208 Witness Credibility; MUJI 2d CR CR401 Fact versus Expert Witnesses. Vermont: VT Crim. Jury Instr. § 1-

Yet, those same instructions offer little to no guidance as to how jurors should undertake this task. Many jurisdictions simply tell jurors that a witness' words and demeanor are relevant to credibility.⁶⁹

Those that go further provide only a little more. For example, Idaho and Arizona additionally instruct jurors to use "everyday life" skills when evaluating truthfulness.⁷⁰ California, Maryland, New York, and Pennsylvania, to name just a few, all recommend the guides of "common sense" or "life experience."⁷¹ Connecticut is more direct, recommending that jurors simply "size up the witness."⁷² And in a model of circularity, Georgia suggests that jurors "believe the witnesses whom you think are most believable."⁷³

Notwithstanding the above, however, the reality is that without additional training, human beings in general, and jurors in particular, are not very good at using demeanor evidence to detect lying.⁷⁴ Our confidence in their ability—our ability—to sort truth from fiction is largely misplaced. As at least one other commentator has noted, "[t]he trial itself may be only a roll of the dice, comparable to the ordeal from which it sprang, according the guilty defendant an opportunity for the intervention of irrational

5-061 Credibility of witnesses. Virginia: 1-2 Va. Model Jury Instr. Crim. Instr. No. 2.050 Preliminary Instr. To Jury; 1-2 Va. Model Jury Instr. Crim. Instr. No. 2.500 Credibility of Witnesses. Washington: 11 Wash. Prac., Pattern Jury Instr. Crim., WPIC 1.02 Conclusion of Trial-Intro. Instr. (3d ed.). West Virginia: WV Crim. Jury Instr. 2.07 Consideration of the Evidence (6th ed.); WV Crim. Jury Instr. 4.01 Sample Charge (6th ed.); WV Crim. Jury Instr. 4.08 Credibility of Witnesses (6th ed.). Wyoming: Wy. Cr. Pattern Jury Instr. § 1.01–1.02(a) (2009).

⁶⁹ See, e.g., Colo. Jury Instr., Criminal 3:06: Credibility of Witnesses (1993); 11 Wash. Prac., Pattern Jury Instr. Crim., WPIC 1.02 Conclusion of Trial Intro. Instr. (3d ed.).

⁷⁰ Ariz. RAJI (Criminal) 3d Preliminary Crim. 10 Credibility of Witnesses; Idaho Crim. Jury Instr., ICJI 104 Trial Procedure and Evidence.

⁷¹ Cal. Jury Instr., 1-200 CALCRIM 226 (Apr. 2008) Witnesses; CRIM MD-CLE 229, MPJI-CR3:10 Credibility of Witnesses (2012); § 4:41 Credibility, 1 Charges to Jury & Requests to Charge in Crim. Case in N.Y. (Oct. 2012); PA-JICRIM 2.04, Pa. SSJI (Crim.), §2.04 Credibility and Weight of Evidence (Apr. 2005); see also, e.g., 1-1 Ind. Pattern Jury Instr. Crim. Instr. No. 1.17 Credibility of Witnesses-Weighing Evidence; § 1:2 General Instr.—Crim. Cases, Miss. Prac. Model Jury Instr. Crim. (Nov. 2012); MUJI 2d CR CR401 Fact versus Expert Witnesses; 1-2 Va. Model Jury Instr. Crim. Instr. No. 2.500 Credibility of Witnesses.

⁷² 5 Conn. Prac., Crim. Jury Instr. §3.4 Accepting Truth of Testimony (4th ed.).

⁷³ 2 Ga. Jury Instr., Crim. §0.01.00 Preliminary Jury Instructions.

⁷⁴ Many criminal cases, of course, do not require jurors to assess guilt based only upon the demeanor of witnesses. They also have additional tools at their disposal, like corroboration, plausibility, and certain character evidence. However, as has been noted, the reliability of these alternate tools is almost entirely dependent upon the strength of the investigation. Uviller, *supra* note 2, at 825.

deliverance while threatening confirmation of the false accusation.”⁷⁵

III. HOW JURIES GET IT WRONG AND WHY WE SHOULD CARE

Though we ask jurors to do it every day (and place great confidence in their ability to get the job done right), in reality, there is scant evidence that jurors are accurately sorting those who lie from those who tell the truth. Indeed, studies increasingly indicate that without additional training, the average juror does little better than chance at reliably detecting truth-telling.⁷⁶ Of particular relevance to a criminal justice system—in which prosecution witnesses are often the only witnesses a jury will hear—at least one study has documented that while individuals do somewhat *better* than chance at identifying witnesses who tell the truth, they fare *far worse* than chance when identifying liars.⁷⁷ If the cost of potentially erroneous assessments were not so high, there would be less cause for concern. Unfortunately, the cost of factually inaccurate verdicts is staggering both individually and system-wide.

As the now-routine exoneration of convicted inmates reveals, we have not yet eradicated the risk of mistrusting some who tell the truth nor the danger of believing some who lie. More reliable outcomes are important not only to those embroiled in the system, but to all who care about its legitimacy.⁷⁸

A. *What Counts as a Lie*

As a preliminary matter, it is important to note that a distinction exists between those who lie and those who do not tell the truth. Consequently, a brief discussion of what is considered a “lie” for purposes of this paper is in order. Within the term “lie,” I mean to include, first, the deliberate transfer of false information. Witnesses,

⁷⁵ *Id.* at 827–28.

⁷⁶ See Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991) (citing studies).

⁷⁷ Timothy Levine, Hee Sun Park & Steven McCornack, *Accuracy in Detecting Truths and Lies: Document the Veracity Effect*, 66 COMMUNICATIONS MONOGRAPHS 125 (1999).

⁷⁸ Though beyond the scope of this Article, it is interesting to note that concerns about truth-telling and system legitimacy reaches far more broadly than the criminal justice system. Indeed, the legitimacy of a democratic form of government depends in no small part on the ability of citizens to “trust” what they are told by their leaders: “Laws work when most people believe they are fair, when it is a minority not the majority who feel it is right to violate any law. In a democracy, government only works if most people believe that most of the time they are told the truth, and that there is some claim to fairness and justice.” EKMAN, *supra* note 8, at 324.

for any number of reasons, may unintentionally provide a jury with false information. Eyewitnesses who earnestly, though mistakenly, believe the light was green must be distinguished from those who know the light was red but deliberately testify otherwise.⁷⁹ Liars, for purposes of this paper, include only the latter.

For purposes of this paper, the term “lie” also includes the deliberate withholding of truthful information with the intention to mislead. Due to the universal admonition that witnesses tell the “truth, the whole truth, and nothing but the truth,” both concealment and affirmative falsification are considered lying for purposes of this paper.⁸⁰

The distinction with regard to the speaker’s intentions is significant. Many of the clues to deception discussed in the next section are present only if the speaker is deliberately misleading the audience. Consequently, this Article offers remedies that will help the criminal justice system address only deliberate deception. A separate set of remedies will be needed to address unintentionally (but nonetheless damaging) false witness testimony.⁸¹

B. *Seeing Truth and Spotting Lies*

In the courtroom, jurors rely upon three categories of data to assess credibility.⁸² Using the first—motivational—jurors consider

⁷⁹ The structure of criminal trials has the potential for turning witnesses who start out deliberately fabricating into witnesses who earnestly believe their testimony by the time of trial. Such witnesses will be very difficult to identify as liars. Researchers have found that the repeated recitation of a narrative can lead the speaker to believe in its truth even if they once questioned its veracity or knew it to be false. See generally EKMAN, *supra* note 8, at 327–28; Daniel Wright, Elizabeth Loftus & Melanie Hall, *Now You See It; Now You Don’t: Inhibiting Recall and Recognition of Scenes*, 15 APPLIED COGNITIVE PSYCHOLOGY 471, 480–81 (2001) (discussing the malleability of memory).

⁸⁰ Not everyone applies so broad a definition to lying. See, e.g., SISELA BOK, SECRETS xv (Pantheon 1982) (reserving the term “lying”—and its accompanying moral reprobation—for actual falsification); cf. Timothy Noah, *Bill Clinton and the Meaning of “Is,”* SLATE (Sept. 13, 1998), www.slate.com/articles/news_and_politics/chatterbox/1998/09/bill_clinton_and_the_meaning_of_is.html (discussing Bill Clinton’s grand jury claim that the question of whether he lied depended on what the definition of “is” is).

⁸¹ For example, many commentators have suggested modifications to identification procedures that will reduce the risk of honest, but mistaken, misidentifications.

⁸² Uviller, *supra* note 2, at 781. Three categories of credibility assessment data available to jurors: content-oriented, motivational, and behavioral. See, e.g., United States v. Abel, 469 U.S. 45 (1984) (permitting evidence of bias). No such similar guidance, however, is offered the jury for behavioral clues provided by witnesses.

whether a witness has any reason (or motive) to testify inaccurately. For example, a witness's relationship with a party or a witness's financial interest in the outcome of a case is a motivational cue that may be considered. The second—content-oriented—allows jurors to question the plausibility and internal consistency of the witness's story.⁸³ Content-oriented evaluations may also consider how a witness's story matches up against other evidence. Finally, the jury has behavioral observations to help assess the witness's credibility. It is this category of data that is most irksome, for we are increasingly gaining appreciation for our imperfect ability to process behavioral clues to deception.

Despite the popular media messages to the contrary, discussed above, most human beings are not particularly good at identifying speakers who lie.⁸⁴ Some studies have found that test subjects can accurately identify a speaker who is lying at a rate not much better than chance.⁸⁵ This is in no small part because many popular myths about truth-telling are inaccurate.⁸⁶ There is no one indicator of deceit. For example, fidgeting and shifty eyes (though commonly heralded as signs of insincerity) actually have little to do with

Indeed, as discussed in greater detail below, jurors are encouraged to make what they will of a witness' demeanor.

⁸³ Jurors' plausibility assessments can become less accurate the greater the cultural distance between the witness and the jury. For a fuller discussion, see *infra* note 121.

⁸⁴ One study found that even trained law enforcement professionals, psychotherapists, trial attorneys, and judges did no better than chance when asked to assess credibility. See EKMAN, *supra* note 8, at 285, 335. The exception to these findings were Secret Service agents, and discrete groups of federal officers, police officers, and clinical psychologists—all of whom had volunteered to take a workshop on lie-detection. *Id.* at 332, 335. Generally, age, job experience, and sex were not related to one's ability to detect deception. *Id.* at 333. Overall confidence in ability also had little relationship to accuracy. *Id.* In contrast, the ability to spot micro-expressions is related to one's accuracy of detection. *Id.*

⁸⁵ *Id.* at 287 ("Decisions about who was lying and who was truthful had to be made based on seeing each person only once, with no other information about that person. Under those circumstances very few people were accurate.").

⁸⁶ Significantly, the structure of criminal trials hampers jurors' ability to use behavioral cues to divine truth. Both the extended delay between offense and trial, and the opportunity to rehearse or repeat narratives prior to trial interfere with an observer's ability to identify who is speaking truthfully about events. *Id.* at 291–92, 308. In addition, credibility assessments are enhanced when an observer can compare a witness's demeanor in two separate situations. *Id.* at 287 ("When lie catchers can compare the person's behavior in two situations, they are more accurate, although even then most do only slightly better than chance."); see also Maureen O'Sullivan, Paul Ekman & Wallace V. Friesen, *The Effect of Comparisons on Detecting Deceit*, 12 J. OF NONVERBAL BEHAV. 201, 203–15 (1988). Such recurring views of a witness is rarely the norm for criminal trials.

credibility. Similarly, while jurors are more likely to embrace a witness's version of events based upon the witness's confidence,⁸⁷ self-assurance has little to do with the accuracy of a witness's assertion.⁸⁸ In short, lay juries embark upon the task with a false sense of confidence in their ability.⁸⁹

Unlike untrained jurors, trained observers look for multiple signs of the emotions that typically accompany deceit. Researchers have found that lying most commonly produces three dominant emotions in the liar: fear (of being caught),⁹⁰ delight (at accomplishing the deception),⁹¹ and guilt (at deceiving others).⁹² For

⁸⁷ A study concerning eyewitness reliability conducted in 1992, found that the more explicitly confident a witness was in her assertions the more likely the jury was to embrace them. Thus, where a witness professed a 100% certainty, jurors convicted 54% of the time. But, when the witness professed only an 80% certainty, conviction rates fell to 39%. Steven D. Penrod & Brian L. Cutler, *Eyewitness, Experts, and Jurors: Improving the Quality of Jury Decisionmaking in Eyewitness Cases*, ORGANIZATIONAL & WORK PSYCHOL. 1, 2, 5 (1992). The findings of the 1992 study mimicked the findings of an earlier study of the impact of witness confidence on conviction rates. See Robert K. Bothwell, Kenneth A. Deffenbacher, & John C. Brigham, *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revised*, 72 J. OF APPLIED PSYCHOL. 691 (1987). When jurors were presented with expert testimony explaining that witness certainty has a poor correlation with witness accuracy, conviction rates dropped. Penrod & Culter, *supra*.

⁸⁸ Elizabeth F. Loftus, Geoffrey R. Loftus & Jane Messo, *Some Facts About Weapon Focus*, 11 L. & HUMAN BEHAV. 55, 59 (1987) (finding in one study that two groups of witnesses were equally confident about a particular factual assertion, though the first group correctly identified the perpetrator at a rate nearly three times that of the second group).

⁸⁹ Much like popular overconfidence in lie detection, lay people also overestimate the ability of witnesses to recount an accurate factual narrative. Loftus et al., *supra* note 88, at 56. Psychologists studying the issue of "weapon focus" found that lay persons assume that a witness confronted with a gun would "get a good look at both the gun and the face." *Id.* In fact, there is near unanimous agreement among experts that when confronted with a gun, victims "focus on a gun, which will interfere with his or her ability to remember the criminal's face." *Id.*

⁹⁰ Also known as "detection apprehension," the fear of being caught was found to be greatest when one or more of the following conditions exists: (1) the target audience is suspicious or is known for being tough to fool; (2) the liar has had little practice with the lie or a poor track record of successful lying; (3) the stakes are high; (4) the liar has exposure to some form of punishment; (5) the punishment for being caught (either in the lie or for the underlying conduct) is substantial; or (6) the target audience will not benefit from the lie. See EKMAN, *supra* note 8, at 49–64.

⁹¹ Also known as "duping delight," the joy that is derived from deceiving others is greatest when (1) the target audience has a reputation for being tough to trick, (2) the lie is a challenging one, or (3) others know about the lie and can appreciate its performance. See *id.* at 76–79; see also Lynsey F. Gozna, Aldert Vrij & Ray Bull, *The Impact of Individual Differences on Perceptions of Lying in Everyday Life and in a High Stake Situation*, 31 PERSONALITY & INDIVIDUAL DIFFERENCES 1203, 1211 (2001) (investigating perceptions of lying and finding that manipulative people thought lying was easy and

any lie told, each of the three emotions is expected to exist in varying degrees depending upon (1) the liar, (2) the target audience, and (3) the relationship between the two.⁹³ With appreciation for this context, trained observers, thus, look for signs of fear, delight, and guilt in an effort to evaluate honesty.

Lie-detection, however, remains an evolving field.⁹⁴ This is because the signposts of the field are not exclusive. As one researcher commented, “[a]ny behavior that is a useful clue to deceit will for some few people be a usual part of their behavior.”⁹⁵ There are also a variety of reasons unrelated to truth-telling why a speaker might display, for example, indications of shame. As has been rightly noted, “[i]t is next to impossible to distinguish the innocent boy’s fear of being disbelieved from the guilty boy’s [fear of being caught]. The signs of fear would be the same.”⁹⁶ Consequently, evidence of any one of the “lying” emotions is not necessarily conclusive proof of dishonesty. It is also true that innocent people may lie for reasons

experienced joy at a successful deception).

⁹² Also known as “deception guilt,” the remorse associated with lying was found to be greatest when one or more of the following things are true: (1) the person being deceived is not a willing participant in the deception; (2) the lie does not benefit the target of the deception and may even cause him to suffer relative to the liar; (3) the lie is not authorized and is performed in a context in which honesty is expected; (4) the liar and the target respect common social norms; (5) the liar knows the target; (6) the target is not deserving of the lie, either in that they are peculiarly naive or wicked; or (7) the liar has actively encouraged the target’s trust. EKMAN, *supra* note 8, at 64–76.

⁹³ For example, if the liar does not respect the target or if the two do not share a common value set, the potential for deception guilt is substantially reduced. Similarly, if the liar has had ample time to rehearse the lie or has a history of successful deceptions, the fear of being caught (also known as detection apprehension) is greatly lessened. See generally Robert Kraut & Donald Poe, *Behavioral Roots of Person Perception: The Deception Judgments of Customs Inspectors and Laymen*, 39 J. OF PERSONALITY & SOCIAL PSYCHOL. 784, 785 (1980); David Matsumoto et al., *Evaluating Truthfulness and Detecting Deception*, 80 FBI LAW ENFORCEMENT BULLETIN, U.S. DEPARTMENT OF JUSTICE 1, 5 (2011), available at http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/june_2011/school_violence (observing that “liars produced significantly more nonverbal behaviors inconsistent with the context or content of their words than truth tellers”).

⁹⁴ See, e.g., Wellborn III, *supra* note 76, at 1091 (suggesting that transcripts are superior to live testimony for purposes of lie detection “because they eliminate distracting, misleading, and unreliable nonverbal data and enhance the most reliable data, verbal content”). Wellborn’s suggestion that verbal content is the most reliable indicator of veracity is at odds with studies finding that, with a handful of exceptions like tirades and slippage, the actual words uttered generally tend to be a fairly unreliable indicator of veracity. See *infra* note 102.

⁹⁵ EKMAN, *supra* note 8, at 91.

⁹⁶ *Id.* at 51.

unrelated to guilt.⁹⁷ In such cases, it would be difficult for an untrained observer to identify the source of the speaker's tension. Moreover, much as the presence of these emotions need not denote dishonesty, their absence similarly may not be a sign of truthfulness—psychopaths, among others, tend to be quite successful liars because they are generally highly confident and thus less plagued by detection apprehension.⁹⁸ Notwithstanding these limitations, however, those studying deceit have been able to draw some broad conclusions about important clues to credibility.

The first source of such clues is the autonomic nervous system (“ANS”). Indeed, to date, the ANS, rightly or wrongly, has provided the primary “scientific” basis for “lie detection.” When a speaker experiences heightened emotions, the ANS often reflects such shifts by triggering changes in breathing patterns, increased sweating and blinking, pupil dilation, and flushed skin. Polygraph machines⁹⁹ measure some of these changes and thereby allow a specialist interpreting the results to make predictions about the speaker's veracity.¹⁰⁰ Many of the changes detected by polygraph machines can

⁹⁷ Uviller, *supra* note 2, at 813 (“Innocent defendants in criminal cases will of course tell the truth insofar as it promotes acquittal. But even they will lie or omit facts where the full truth would heighten suspicion.”).

⁹⁸ EKMAN, *supra* note 8, at 57; *see also* Uviller, *supra* note 2, at 814 (“[S]ociopathy or previous success with falsehood may bolster the belief . . . that . . . lies will escape detection and persuade.”).

⁹⁹ The results of polygraph tests are not admissible in most states. However, if both the prosecution and the defense agree prior to administration of the test, twenty-two states will allow admission of the results. In two states, New Mexico and Massachusetts, polygraph results are admissible even over the objection of a party. The Supreme Court has yet to issue any definitive guidance on the admissibility of polygraph results. *See United States v. Scheffer*, 523 U.S. 303 (1998). The legal profession's reluctance to fully embrace polygraph examinations is not unfounded. The polygraph is far from a perfect tool. For example, studies have found that the accuracy of polygraph results declines as the lying base rate (the percentage of people tested who actually lie) declines. In other words, in a perverse result the more honest the test pool the less reliable the polygraph results. *See* EKMAN, *supra* note 8, at 346. Moreover, as compared to trained observers, the polygraph is less accurate. Some experts opine that with the exception perhaps of the Guilty Knowledge test, polygraph results, while better than chance, remain less reliable than a trained specialist's observation of behavioral cues. *Cf.* EKMAN, *supra* note 8, at 324.

¹⁰⁰ A common critique of polygraph machines (and other assessments of ANS reactions) is that they measure only spikes in emotion, but offer little in the way of identifying which emotions are heightened. This lack of specificity raises questions of reliability. A highly self-righteous person might feel anger at the mere thought of being accused. Such anger would trigger the same changes in the autonomic nervous system that one would expect to see with a guilty suspect's feelings of guilt or fear. *See* Cooper Ellenberg, *Lie Detection: A Changing of the Guard in the Quest for Truth in Court*, 33 L. & PSYCHOL. REV. 139, 141 (2009) (quoting Daniel D. Langleben,

also be observed by the naked eye. It is a juror's observation of such changes that helps form an understanding of a witness's truthfulness in court.

What can actually be divined from the physical changes produced by the ANS, however, is questionable. At present, both scientists and casual observers are unable to pinpoint which heightened emotion is responsible for a displayed ANS response. If a speaker's face is flushed, without additional clues, it may be difficult to tell if the redness is caused by anger or embarrassment. Accordingly, it can be difficult to tell what, if anything, to make of such a reaction.¹⁰¹ It is perhaps not surprising that even a talented

Detection of Deception with fMRI: Are We There Yet?, 13 LEGAL AND CRIMINOLOGICAL PSYCHOL. 1, 2 (2008) ("The polygraph relies on physiological measurements from the peripheral nervous system . . . 'which places a ceiling on the accuracy potential.'"); see also Gershon Ben-Shakhar, Maya Bar-Hillel & Mordechai Kremnitzer, *Trial by Polygraph: Reconsidering the Use of the Guilty Knowledge Technique in Court*, 26 L. & HUMAN BEHAVIOR 527, 528 (2002) ("A particularly problematic feature of the CQT from the legal perspective is its lack of discriminant validity . . . the test outcomes can reflect various constructs, other than deception, such as surprise, fear, and stress.").

¹⁰¹ Our understanding of the autonomic nervous system is still rudimentary. The dominant view among scientists—that any change in emotion will produce an untargeted response by the speaker's ANS—is facing challenges from a developing view that changes caused by the ANS are targeted to changes in specific emotions. The science in this area, however, is still very much in development. Polygraph exams monitor the emotional responses of the test subject as the subject is asked a series of questions. Both the Control Question test and the Guilty Knowledge test are commonly used by polygraph examiners. With the Control Question test, an "emotion producing" question is asked of the subject (one that the subject is expected to lie about) to obtain a baseline for assessing future responses. The Guilty Knowledge test consists of true/false/I don't know statements. During the test, a statement containing true information is embedded in a series of false statements about the crime (e.g., "The victim was found in the kitchen," "The victim was found in the living room," "The victim was found in the bedroom."). As the examiner works through each statement, he is looking for spikes in the subject's emotions when the truthful factual assertion is encountered. Such a response is significant because, beyond random chance, a person without knowledge of the offense would not be expected to have different emotional reactions to any of the statements.

Both forms of questioning have drawbacks. With the Control Question test, if the control question is not carefully crafted (or if the subject is, for reasons unrelated to guilt, more emotionally aroused by the offense specific questions than the control question), it will not produce a reliable baseline for judging responses. With regard to the Guilty Knowledge test, the true statement in the test must be one that could only be known by the guilty offender. If the subject has been exposed to "guilty knowledge" through means other than the commission of the offense, the test will not be effective. DAVID LYKEN, A TREMOR IN THE BLOOD: USES AND ABUSES OF THE LIE DETECTOR (McGraw-Hill 1981). If a subject has been tainted, the Guilty Knowledge test will produce a false positive—where an innocent person is deemed to be lying about his lack of involvement. Alternatively, it is possible an examiner will ask about details that simply went unnoticed by the offender. In such cases, the Guilty

lawyer will often be unable to accurately reveal for the jury the source of the witness's discomfort without the time and resources to develop true familiarity with the witness, the facts, and interplay of narratives of other parties and players.

In addition to ANS changes, jurors also have words, facial expressions, voice patterns and changes, and body movements to provide them with some quantity of information about a witness's truthfulness. Of these, words and facial expressions are, with particular exceptions noted below, the most unreliable indicators of truthfulness. With regard to the former, this is because with practice, most liars are able to demonstrate extraordinary control over their word choice. To the extent that lying is disclosed through the speaker's words, it is most often a function of carelessness—manifesting itself in speech errors like slips of the tongue, word and sentence repetition, or speech hesitations.¹⁰²

And, though it is harder to control your facial expression than your word choice, a lifetime of casual feedback renders most of us (liars included) somewhat accustomed to managing our countenance when called upon to do so. There are, however, exceptions to this general rule. To the extent facial expressions offer meaningful clues to deceit, it is often in the form of micro-expressions, abridged expressions, or reliable muscle leakage.¹⁰³ A micro-expression is a

Knowledge test would produce a false negative—adjudging a guilty person to be truthful in her protestation of innocence. On balance, studies have found that polygraph exams do catch liars at a rate that is better than chance. However, they do make mistakes. See *Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum*, OFFICE OF TECHNOLOGY ASSESSMENT (Nov. 1983), available at <https://antipolygraph.org/documents/ota-polygraph-report.pdf>.

¹⁰² There are three primary ways in which a liar might be betrayed by her words: poorly constructed lies, unintended slips of the tongue, and emotional tirades. EKMAN, *supra* note 8, at 87–90; see also Aldert Vrij & Samantha Mann, *Police Use of Nonverbal Behavior as Indicators of Deception*, in APPLICATIONS OF NONVERBAL COMM. 63, 67 (Ronald E. Riggio & Robert S. Feldman eds., 2005) (“The results concerning *speech errors* (word and/or sentence repetition, sentence change, sentence incompletions, slips of the tongue, and so on) and *speech hesitations* . . . show a conflicting pattern. In most studies an increase in such errors (particularly word and phrase repetitions) and hesitations have been found during deception.”). A handful of studies suggest that a liar's words might also provide deception clues if her responses are particularly convoluted or long-winded. However, the validity of the connection between circumlocution and dishonesty is disputed. *Id.* at 90–91; see also *id.* at 288 (noting that lie catchers who relied only upon the words that were spoken were far less accurate in their assessments than lie catchers who relied upon cues provided by the voice, body, and face).

¹⁰³ As with any clue to deceit, the observer must be careful not to draw unwarranted conclusions. To the extent that facial expressions provide evidence, it is evidence of concealed emotions not conclusive evidence of deceit. For a fuller

fleeting, but complete, expression of true emotions.¹⁰⁴ For example, a woman who has murdered her husband and wants to evade detection may display a momentary smile when told by investigators that “the killer skillfully covered his tracks.” Those studying micro-expressions found that they tend to be reliable evidence of true emotions—and thus useful clues for lie detection. The second detection clue offered by the speaker’s face is the abridged expression. Abridged expressions are partial expressions of true emotion that begin to erupt before being corrected by the speaker. For example, our husband killer, above, may begin to smile (but not complete the expression) before returning her countenance to one of concern, worry, and sadness. Finally, the speaker may reveal deceit through involuntary facial movements caused by so-called “reliable” muscles that cannot typically be suppressed or mimicked.¹⁰⁵ For example, muscle movements that occur in the forehead and eyebrows with real feelings of sadness and fear are both difficult to duplicate and

discussion of the use of facial expressions in detecting truth, *see* EKMAN, *supra* note 8, at 83–84 & Ch. 5.

¹⁰⁴ Current research suggests that “micro-expressions” may be a significant source of highly accurate leakage revealing deception. Stephen Porter & Leanne ten Brinke, *Reading Between the Lies: Identifying Concealed and Falsified Emotions in Universal Facial Expressions*, 19 PSYCHOL. SCI. 508, 508 (2008) (examining the “presence of inconsistent emotional expressions and ‘microexpressions’ (between 1/25 and 1/5 of a second) in genuine and deceptive facial expressions”). Micro-expressions are spontaneous facial expressions lasting less than a quarter of a second. They provide a full but fleeting picture of the speaker’s true emotions. With limited practice, lay observers can become trained to recognize micro-expressions, and thereby gain a window into the true emotions of the speaker. David Matsumoto & Hyi Sung Hwang, *Evidence for Training the Ability to Read Microexpressions of Emotion*, 35 MOTIVATION & EMOTION 181, 181 (2011) (finding that the ability to read micro-expressions can be trained and retained). In some studies, accurate identification of micro-expressions led to deception detection rates that were accurate more than 70% of the time. EKMAN, *supra* note 8, at 129–30, 350–53.

¹⁰⁵ Researchers have established that facial expressions are a combination of both voluntary and involuntary muscle movements. EKMAN, *supra* note 8, at 84. There are a handful of muscle movements that are difficult to produce voluntarily (and difficult to hide). Known as so-called “reliable” facial muscles, these muscles cannot be controlled by most people. *Id.* at 134–37. And while the eyebrow and forehead movements that indicate anger and surprise can be easily mimicked and hidden, the narrowing of the lips that occurs with authentic anger is more difficult to replicate (though research shows it can be easily covered). *Id.* at 135. Within these difficult to mimic/cover expressions, a trained observer might look for clues to deception. Even “reliable” facial muscle movements, however, do not provide failsafe deception clues. Natural liars, method actors, and psychopaths typically have the ability to reproduce or suppress even reliable facial muscle movements. *Id.* at 137. Similarly, people with particularly expressive faces may exercise greater control than others over the muscles typically thought to be “reliable.” *Id.* at 138–39.

difficult to mask.¹⁰⁶ Thus, our husband killer's feigned grief may be easily detectable to a trained observer.

It is the job of skilled lawyers to elicit such expressions in the hopes that jurors will catch them. While micro-expressions, abridged expressions, and reliable facial muscles are all useful clues, however, they are far from failsafe or universally applicable. Micro-expressions and abridged expressions can be difficult to detect, both because they last for such a brief period (fractions of seconds) and because an observer must know what to look for. Thus, there is a risk that such expressions will be overlooked or missed, even with multiple jurors watching a witness closely for reactions that can be shared and pondered during deliberations. While some suggest, therefore, that the probability of arriving at a correct answer increases as you increase the number of deliberators, if those deliberators are all equally uninformed about which behaviors have predictive utility, there is not reason to believe that twenty-four eyeballs will be any better than two.¹⁰⁷ In addition, these expressions cannot be universally analyzed because only some speakers display them. Similarly, with regard to reliable facial muscle movements, researchers have found that some people—like actors—are able to convincingly manipulate expressions controlled by reliable facial muscles.

The information provided by a speaker's face is not limited to the three sources discussed above. In addition, an observer may be able to tell something about the speaker's veracity—at least with regard to positive emotions—by paying attention to the symmetry of the speaker's expression. Researchers have found that false expressions of happiness are often accompanied by asymmetrical smiles.¹⁰⁸ False smiles also tend to involve only the lower half of the

¹⁰⁶ Pierre Gosselin, Madeleine Warren & Michele Diotte, *Motivation to Hide Emotion and Children's Understanding of the Distinction Between Real and Apparent Emotions*, 163 J. GENETIC PSYCHOL. 479, 492 (2002) (citing Ekman for the proposition that it is difficult to neutralize the face completely when an intense negative emotion is felt); Porter & Brinke, *supra* note 104, at 512 (“[N]egative emotional expressions include muscle actions that are under less volitional control than those involved in expressions of happiness.”).

¹⁰⁷ See generally James Surowiecki, *THE WISDOM OF CROWDS* (Anchor Books 2005); David Austen-Smith & Jeffrey S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 AM. POL. SCI. REV. 34, 34–45 (1996).

¹⁰⁸ Pierre Gosselin, Mélanie Perron & Reem Maasarani, *Children's Ability to Distinguish Between Enjoyment and Non-Enjoyment Smiles*, 19 INFANT & CHILD. DEV. 297, 298 (2010) (citing P. Ekman, J.C. Hager & W.V. Friesen, *The Symmetry of Emotional and Deliberate Facial Actions*, 18 PSYCHOPHYSIOLOGY 101 (1981)) (noting that non-enjoyment smiles have been found to differ from enjoyment smiles “by asymmetrical

face, and do not include any movement of the area around the eyes.¹⁰⁹

The timing of expressions also bears some relationship to veracity. In the absence of a continued stimulus, most expressions do not last long. Consequently, expressions that are held for extended periods generally reveal some level of deceptiveness. Expressions that are not in sync with the flow of conversation or that appear at odds with associated physical movements also may expose pretense.¹¹⁰

Another source of information about truthfulness that is closely related to facial expression is the direction of one's gaze. Researchers have discovered that an individual's gaze changes with shifts in emotion. As a consequence, people tend to shift their gazes downward when sad, away when disgusted, and downward or away when guilty or ashamed.¹¹¹ As with many other facial expressions, however, the direction of gaze is a highly unreliable source of deception clues—for it is a well-known subject of scrutiny that is easily controlled and thus not often present with actual deception.¹¹² We expect liars to cast about a shifty gaze. Therefore, rehearsed liars

activation of the Lip Corner puller and the Cheek Raiser"). There is some suggestion that the findings regarding asymmetrical expressions are generally applicable to the expression of false emotions as well. However, to date, consensus in the field has only been developed with regard to asymmetry and positive emotions. See EKMAN, *supra* note 8, at 145–46. Moreover, because the asymmetry of expressions tends to be very slight, it is not clear yet whether observers can detect the relevant differences outside the controlled environment of the laboratory. Finally, it bears mention that the presence of symmetry does not necessarily indicate true emotion, for not every false expression is asymmetrical. *Id.*

¹⁰⁹ If a false smile is broad enough, the movement of the mouth muscles may push up the eyes to form crow's feet. This is a different muscle movement than the movement that is seen with genuine smiles, which tends to involve the eyebrows as well.

¹¹⁰ *Id.* at 353 ("Any one of the seven emotions that have a universal expression—anger, fear, disgust, contempt, sadness, surprise, or happiness—can be important in detecting lies when, but only when, it contradicts what is being said, or the line the person has taken. If the facial expression fits with the words or the general line, it has no significance for uncovering lies.").

¹¹¹ Reginald B. Adams & Robert E. Kleck, *Effects of Direct and Averted Gaze on the Perception of Facially Communicated Emotion*, 5 EMOTION 3 (2005) (finding that averted eye gaze enhances the perception of avoidance-oriented emotions, such as fear and sadness); Dacher Keltner, Randall C. Young & Brenda N. Buswell, *Appeasement in Human Emotion, Social Practice and Personality*, 23 AGGRESSIVE BEHAVIOR 359, 362 (1997) ("The embarrassment display unfolds in the following pattern of nonverbal behavior: gaze aversion, a smile control, smile, a second smile control, and then head movements down and face touching.").

¹¹² Jeremy Blumenthal, *A Wipe of the Hands, A Lick of the Lips*, 72 NEB. L. REV. 1157, 1194 (1993).

often prepare to look the audience directly in the eye.

As demonstrated, while words and facial expressions provide some information about truthfulness, they are not always trustworthy indicators of truth-telling. Nevertheless, they persist as the signals most doggedly relied upon by untrained observers.¹¹³ In reality, observers would do better in their search for truthfulness by examining a speaker's voice¹¹⁴ and the body.

Much like the face, a speaker's voice is wired to parts of the brain that involve emotions. Unlike the face, however, most individuals lack the ability to mask some of the changes in the voice that are produced by spikes in emotion.¹¹⁵ For example, studies have shown that in most people, the pitch of their voice rises as they become more angry or fearful. In addition, they tend to talk faster and more loudly.¹¹⁶ As related to lie detection, this means we should expect someone with a high degree of detection apprehension (i.e., fear of getting caught) to speak more quickly and loudly, and in a higher pitched voice than normal. When utilizing these types of indicators, though, caution is always warranted. In keeping with the opening observation, a higher pitch is not of itself a sign of deceit, it is simply a sign of fear or anger; *what* the speaker is afraid of or mad about is a separate question entirely.

Like the voice, the body can be a vital source of information about the emotional state of the speaker. Though far easier to control than one's voice, researchers have found that liars often fail to regulate the information about truthfulness that their bodies leak,

¹¹³ EKMAN, *supra* note 8, at 81.

¹¹⁴ "Voice," as used here, is intended broadly to include all parts of speech, not just the speaker's words.

¹¹⁵ Extended or frequent pauses may be one deception clue that is provided by the liar's "voice." Deception may also be indicated by speech errors, including the use of non-words ("I, ah, really think you're great."), the repetition of words ("I, I, I. . . I really think you're great."), and the use of partial words ("I rea-really think you're great."). A lack of preparation and high detection apprehension are thought to be the primary causes of such voice clues. One psychologist found that information concerning deception can be found more often in the speaker's voice than in the face or body. Blumenthal, *supra* note 112, at 1193.

¹¹⁶ Aron Wolfe Siegman, Robert A. Anderson & Tal Berger, *The Angry Voice: Its Effects on the Experience of Anger and Cardiovascular Reactivity*, 52 PSYCHOSOMATIC MED. 631, 632 (1990) (finding "convincing evidence that expressive anger is associated with loud and rapidly articulated speech"); Nelson H. Soken & Anne D. Pick, *Intermodal Perception of Happy and Angry Expressive Behaviors by Seven-Month-Old Infants*, 63 CHILD DEV. 787, 794 (1992) (finding that "angry expressions are abrupt, pulsating and rapid in rhythm with an intense, loud voice and high degree of facial movement"); *see also* EKMAN, *supra* note 8, at 93.

simply “because it is ignored.”¹¹⁷ Consequently, trained observers may be able to gain substantial information from a speaker’s body movement. Contrary to popular notions, however, reliable information about the speaker’s veracity does not often take the form of body positioning.¹¹⁸ Rather, the revelation of true emotions by body movement occurs primarily in two ways—through the unintentional (and at times fleeting) display of emblems, and through changes in the frequency of illustrators.¹¹⁹

Emblems are culturally-specific, learned gestures that substitute for definite verbal messages. For example, flexing your index finger quickly and repeatedly in the direction of another person (while holding your hand palm up with the other fingers bent) is an emblem interpreted fairly universally in North America as a command to “come here.” Though most often executed in a deliberate fashion emblems can be leaked signs of deceit when they are performed only partially or are performed using an uncharacteristic posture. These so-called “emblematic slips” are viewed as highly reliable indicators of true emotions or honest messages. Unfortunately, much like micro-expressions, only some liars display emblematic slips.¹²⁰

¹¹⁷ EKMAN, *supra* note 8, at 85; see also Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 185 (1990) (“[L]ying witnesses move their hands less, speak with higher pitched voices, and, even though they may control their facial expression, may reveal their deceit through foot and leg movements.”).

¹¹⁸ Fidgeting and some postures (e.g., crossed arms) are often targeted in the popular conscience as symbolic evidence of lying. However, while experts have found that fidgeting does increase with nervousness, individual poses (or changes in posture) are largely unrelated to deceit. See, e.g., Kraut & Poe, *supra* note 93, at 784–98. The increased manipulation of body parts (twisting strands of hair, biting at cuticles, tugging on an ear lobe) while speaking has also been found to be largely unrelated to truthfulness. Indeed, some familiarity with the speaker is required before even the most limited conclusions might be drawn as a result of increases or decreases in the speaker’s manipulators and body positions.

¹¹⁹ See A. Milton Jenkins & Randall D. Johnson, *What the Information Analyst Should Know About Body Language*, 1 MIS Quarterly 33, 38 (1977) (“[T]he use of illustrators decreases when the speaker is trying to deceive the listener. Generally speaking, the hands and the body are better indicators of deceptive behavior than is the face when the observer has a period of honest behavior to use as a comparison base.”); see also Vrij & Mann, *supra* note 102, at 68 (“[L]iars tend to make fewer illustrators (hand and arm movements designed to modify and/or supplement what is being said verbally) and fewer hand and finger movements (non-functional movements of hands and fingers without moving the arms) than truth tellers. The decrease in these movements might just be the result of lie complexity.”).

¹²⁰ Very little is currently known about the percentage of liars who display emblematic leakage. However, the few studies that have been done suggest that a

Another window into a speaker's true emotions is a change in the speaker's use of illustrators. While emblems take the place of speech, illustrators accompany speech to provide emphasis or pause. Illustrators may take the form of hand gestures, arm or other bodily movements, or even expressive faces. When a speaker is carefully focused on word selection, studies have found that the speaker's use of illustrators decreases. Similarly, the use of illustrators decreases when the speaker is fearful, saddened, or disengaged. Consequently, trained observers looking for signs of dishonesty watch carefully for changes in the speaker's typical use of illustrators.

Using illustrators as the barometer for truthfulness can prove challenging, however. Illustrators are highly idiosyncratic and tend to vary widely from person to person and from culture to culture. Thus, gleaned information about truth-telling by observing the speaker's use of illustrators is necessarily a comparative pursuit—it is the change in illustrators that is most telling. Therefore, some familiarity with the speaker is needed for any meaningful conclusions to be drawn. For this reason, it is next to impossible to utilize illustrators to determine when a complete stranger is lying. Lie detection is also difficult when speaker and audience do not share a common culture.¹²¹ Moreover, because illustrators accompany speech but do not take its place, a decrease in illustrators provides less reliable evidence of deceit than leaked emblems, for lying is just one reason a speaker may feel cautious, frightened, sorrowful, or disconnected.¹²²

relative minority of liars do so. EKMAN, *supra* note 8, at 102–03.

¹²¹ C.F. Bond, A. Omar, A. Mahmoud & R.N. Bonser, *Lie Detection Across Cultures*, 14 J. NONVERBAL BEHAV. 189, 189 (1990) (showing similar patterns of lie detection within two cultures, but finding no lie detection across cultures); *see also* EKMAN, *supra* note 8, at 261–62 (“Differences in national and cultural background can also obscure the interpretation of vocal, facial, and bodily clues to deceit. . . . If the lie catcher does not know about these differences and does not explicitly take account of them, he is vulnerable to misinterpreting all of these behaviors and making disbelieving-the-truth or believing-a-lie mistakes.”). *But see* Faye A. Al-Simadi, *Detection of Deceptive Behavior: A Cross-Cultural Test*, 28 SOC. BEHAV. & PERSONALITY 455, 460 (2000) (finding that lies can be detected across cultures if judges have access to both auditory and visual cues).

¹²² Though jurors are often passive audiences that must watch and listen for clues to deceit, judges at times actively engage in trials in ways that may elicit additional clues. For example, judges may undertake the questioning of witnesses. Putting aside the question of a judge's need to appear impartial, it is unclear at this point whether a “dubious” or “compliant” questioner is more likely to uncover a lying witness. Receiving a witness with overt skepticism may increase the clues likely produced by a liar's detection apprehension. However, evident doubt may also put the witness “on notice,” and thereby reduce the frequency of the witness' careless

Beyond exact clues to deception, we also know that no matter what cues are being interpreted, assessment is greatly enhanced by the evaluator's familiarity with the speaker. The greater that familiarity, the more easily the audience can assess whether a particular speech pattern or tone of voice is evidence of an uncharacteristic emotional state or simply a usual trait.¹²³

Assessment is also enhanced if the audience is actively and critically engaged in the task. By this, I do not mean the audience should simply watch the speaker more closely, but rather, the audience should consider context to evaluate the likelihood of lie detection. The audience needs to assess whether it is likely the liar will make mistakes, and if so, what the mistakes are likely to be.¹²⁴ Has the speaker had an opportunity to rehearse? Does the speaker have practice with lying? Is the audience a willing participant in the falsehood? An affirmative response to any of these questions indicates circumstances that make it easier for a liar to accomplish deceit. If the speaker is likely engaging in an easy lie, the audience should not expect to find clues of deception and should instead look elsewhere to determine truth. Jurors should know this. Indeed, "errors are less likely if such judgments are made more explicitly. If one is aware of the source of one's impressions, if one knows the rules that one follows in interpreting specific behaviors, corrections

mistakes. Such an approach also may increase the risk of discrediting a truthful witness by increasing that witness' fear of being disbelieved. EKMAN, *supra* note 8, at 182–83. More research will need to be done before any firm conclusions on this matter can be drawn.

¹²³ Familiarity also assists the evaluator in making plausibility determinations. As Uviller has noted, in addition to looking for behavioral clues, jurors listening to a witness' narrative engage in a form of "plausibility matching" that tests the witness's narrated reactions against the juror's beliefs about a likely response to similar stimuli. Uviller, *supra* note 2, at 783–784. "The trouble of course is that frequently the cultural context and customs of the actors in the events recounted by the witnesses are totally alien to the jurors seeking a plausibility match. Neither the jurors nor anyone they are likely to know have had any experiences comparable to those now described from the witness stand by an adolescent drug dealer or a professional underworld hoodlum." *Id.*

¹²⁴ The most difficult lies are those that require the speaker to mask emotions felt at the time of the lie. The stronger and more varied the emotions felt, the more difficult it should be to conceal them. Thus, "terror is harder to conceal than worry, just as rage is harder to conceal than annoyance." EKMAN, *supra* note 8, at 31; *see also id.* at 240–41. Behavioral specialist Paul Ekman has created a checklist of questions that can help to identify the likelihood of detecting deception. *Id.* at 369 (Table 4). This checklist includes questions like, "Does the lie involve emotions felt at the moment?" and "Does the liar have a good memory?" *Id.*

are more likely.”¹²⁵

As the above reflects, the task of truth-telling is complex; and while there is much we know, there also remains great uncertainty. As even the experts agree, trained observers cannot point to a single look or body movement and say with certainty that the speaker is a liar.¹²⁶ This may cause skeptics to suggest that we simply do nothing—maintain the status quo until more certainty in the field is accomplished. But continued delay is not a wise course.

With stakes so high, concern about the ambiguity of the endeavor does not merit persistent abdication of the task to uninformed juries. As noted, some studies have found that lay observers do not do much better than chance in their attempts to identify liars. Yet, juries make decisions about honesty every day in ways that have significant consequences for defendants and victims alike. Indeed, even if it could be said that jurors are prepared by life experience to make credibility assessments, the artificial conditions under which they do so in the courtroom bear little semblance to situations individual jurors face in the real world.¹²⁷ As one researcher has noted, “[f]aced with that ambiguity most people resolve it by becoming quite convinced they can tell from demeanor which one is telling the truth. It is usually the person with whom they were most sympathetic to begin with.”¹²⁸ The stakes are too high to allow decisions in our criminal justice system to be driven by the party or witness with the most relatable profile.

C. *The Jury’s Ability to Sort Truth and Lies Matters*

Certainly, some have argued that we should not expend energy precisely calculating the accuracy of outcomes in our criminal justice system. For these naysayers, “myth is the mortar of the justice system anyway, and . . . as long as the assumptions drive a mechanism that turns out a result generally accepted by the people, the system works.”¹²⁹ But, contrary to such claims, both as a normative matter and as a practical one, accuracy in the criminal justice system matters. “The price of false confidence in the acuity of common sense and ordinary experience is groundless faith in the jury system and

¹²⁵ *Id.* at 254.

¹²⁶ *Id.* at 80–81.

¹²⁷ Uviller, *supra* note 2, at 780, 831.

¹²⁸ EKMAN, *supra* note 8, at 320.

¹²⁹ Uviller, *supra* note 2, at 777.

dullness in its improvement.”¹³⁰ Some studies have found that a lack of confidence in the criminal justice system results in communities that are less safe as cooperation erodes and hostility toward law enforcement rises.¹³¹ Indeed, even vicarious exposure to law enforcement injustices erodes individual confidence in the system.¹³² The number of citizens touched by the criminal justice system, the substantial evidence suggesting that mistakes are being made, the relationship between system accuracy and system legitimacy, and the failure of current safeguards to prevent errors all mean that the jury’s ability to spot liars matters. Our current criminal justice system provides thousands of false-positives each year that give us reason to ponder system upgrades.

The United States currently has the highest incarceration rate in the world. The sheer number of fellow citizens we lock behind bars is staggering. Well over a million people are confined in prisons each year on felony charges.¹³³ For example, in 2010, the number of incarcerated persons was 1,612,395.¹³⁴ When the number of convicted people who are subject to any form of correctional supervision (including local jails and community supervision) is also considered, the total explodes to more than 7 million.¹³⁵ While the overwhelming majority of this total is incarcerated following negotiated pleas, a small but significant fraction is incarcerated following a jury trial.¹³⁶

¹³⁰ *Id.* at 784.

¹³¹ I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835 (2008); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004).

¹³² Jamie L. Flexon, *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180, 182, 187 (2009).

¹³³ Census data reflect there were a total of 1,205,273 felony convictions in federal and state courts in 2006. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 214 tbl. 343 (2011), available at <http://www.census.gov/compendia/statab/2011/tables/11s0343.pdf>. More than 1.1 million of these convictions occurred in state court. *Id.* Of the state court convictions, just 6% were not the result of a negotiated plea. *Id.*

¹³⁴ PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: PRISONERS IN 2010 (2012), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>.

¹³⁵ LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: CORRECTIONAL POPULATIONS IN THE U.S., 2010 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>.

¹³⁶ A survey completed by the National Center for State Courts found just over 97,000 criminal jury trials were held in state courts nationwide in 2006. See GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY ON JURY IMPROVEMENTS: A COMPENDIUM REPORT 5 (2007), available at

A recent survey by the National Center for State Courts found in one year there were approximately 148,558 jury trials held in state courts around the country.¹³⁷ An additional 5,940 jury trials were held in federal courts.¹³⁸ Of state court jury verdicts, 65.4%—or just over 97,000—were handed down in criminal cases. The majority of these were convictions.¹³⁹ As an absolute matter, the accuracy of the outcomes is certainly relevant to the 97,000 state court defendants who went to trial. But it is a false response to suggest that trial accuracy (apparent and actual) is relevant only to those who invoke the right. The perceived accuracy of trial outcomes affects the entirety of the system. It has a significant impact on the willingness of the innocent and guilty alike to negotiate with the prosecution. So too, the perceptible arbitrariness of the system's results bears a direct relationship to its continued authority.¹⁴⁰

A jury's ability to accurately spot liars also matters because, of the cases in the system that go to trial, most are dependent upon witness testimony alone. Popular TV crime dramas imply that scientific evidence is a central feature of all criminal prosecutions. The rise of DNA exonerations, too, has reinforced a belief that a prosecution case built on biological evidence is the norm. But biological samples and DNA evidence are available in only 5–10% of all felony cases.¹⁴¹ Even in the unlikely event that some other form of physical evidence is available in half of the remaining cases, that would still mean a significant percentage of felony prosecutions rely upon witness testimony alone to establish guilt.

Moving beyond analysis of the system's volume, we come to the

<http://www.ncscjurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>. Data collected for that same year (2006) by the U.S. Census Bureau found approximately 67,000 felony convictions following trials in state courts. *Id.* By way of comparison, U.S. Census data from 2006 reflects that of the 1,132,290 felony convictions in state courts that year, 94% (or approximately 1,064,352) were the result of negotiated pleas. *See* U.S. CENSUS BUREAU, *supra* note 133, at 214 tbl. 343.

¹³⁷ Executive Summary of THE STATE-OF-THE-STATES SURVEY ON JURY IMPROVEMENTS: A COMPENDIUM REPORT 2, CENTER FOR JURY STUDIES, *available at* http://www.ncscjurystudies.org/~media/Microsites/Files/CJS/SOS/sos_exec_sum.ashx.

¹³⁸ *Id.*

¹³⁹ *See supra* note 136 (finding that approximately 67,000 people are convicted of felonies in state court trials each year).

¹⁴⁰ *Cf. Speiser v. Ransall*, 357 U.S. 513, 520–521 (1958); *In re Winship*, 397 U.S. 358, 364 (1970).

¹⁴¹ Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279, 1283 (2010).

question of error rate. A recent database on wrongful convictions suggests that there may be substantial problems with the credibility assessments jurors are currently making. In May 2012, University of Michigan Law School Professor Samuel Gross, working in collaboration with the Center on Wrongful Convictions at Northwestern University's School of Law, launched the National Registry of Exonerations.¹⁴² The registry, which tracks known exonerations in the United States since 1989, currently has more than 900 entries and continues to grow.¹⁴³ A review of the database reveals that witness perjury is the greatest source of wrongful murder convictions. Similarly, in rape cases, eyewitness error was found to be the single greatest source of wrongful conviction.¹⁴⁴ The consequences of the jury's erroneous credibility assessments are substantial for the defendants whose cases are included on the registry. Half of the exonerees in the database spent more than a decade in prison.¹⁴⁵ An overwhelming majority (75%) spent at least five years behind bars. Some died before their cases were overturned.¹⁴⁶

While admittedly not conclusive proof, the rise in DNA exonerations strongly suggests a need for concern about systemic error rates.¹⁴⁷ At the most basic level, DNA exonerations make plain to the general public a fact that has been obvious to criminal justice practitioners for decades. Since 1989, the Innocence Project in New York has used DNA evidence to secure the exoneration of more than 300 inmates.¹⁴⁸ Not surprisingly, the general public now accepts the broader reality that that figure suggests: innocent people are sometimes convicted of serious crimes. Indeed, since 1999, a consistent and overwhelming majority of Harris poll participants

¹⁴² See THE NATIONAL REGISTRY OF EXONERATIONS, www.exonerationregistry.org (last visited Jan. 21, 2014). The launch of the registry received substantial media attention. See, e.g., Michael Doyle, *New Exoneration List Shows Some Patterns*, WASH. POST, June 10, 2012, at A6.

¹⁴³ See The National Registry of Exonerations, www.exonerationregistry.org.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Darryl Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudications*, 93 CAL. L. REV. 1585, 1608–09 (2005) (“When adjudication cannot prevent errors, it conceals them. It is this obscuring of the periodic disconnect between resolution and truth that DNA analysis and other accuracy-enhancing developments have undermined.”).

¹⁴⁸ DNA Exonerations Nationwide, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Jan. 21, 2014).

(95%) have expressed such a belief.¹⁴⁹ When asked to predict the system's error rate, the average prediction among those polled was 12 mistakes in every 100 convictions, or 12%. That estimation, though high, was not terribly far off. Extrapolating from the information provided by DNA exonerations, some studies have found that the error rate in criminal cases nationally could be as high as 8%.¹⁵⁰

Assuming a rate that is even a fraction of the highest estimate would mean the wrongful incarceration of thousands of citizens. As previously noted, in 2010, the Bureau of Justice Statistics estimated that approximately 1.7 million Americans were incarcerated in state and federal prisons. Thus, even using Professor Risinger's oft-cited conservative minimum of a 3.3% error rate would mean the wrongful conviction of more than *three thousand* individuals annually.¹⁵¹

The accuracy of juries' credibility assessments also needs to be improved because there are so few safeguards in the system. For example, prosecutors are under no obligation to ensure the truthfulness of the testimony they present. Without question, the law prohibits prosecutors from knowingly presenting false testimony,¹⁵² but prosecutors have no duty to conduct an investigation that significantly reduces the possibility of false testimony being presented. As scholar Angela J. Davis has noted, "they may engage in willful blindness, presenting a witness who helps their case without

¹⁴⁹ Regina A. Corso, *Over Three in Five Americans Believe in Death Penalty*, THE HARRIS POLL (Mar. 18, 2008), <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Over-Three-in-Five-Americans-Believe-in-Death-Penalty-2008-03.pdf>.

¹⁵⁰ Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1336–46 (1997). *But see* Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23 (predicting an error rate of 0.027%). Marquis' error rate was accepted by Justice Scalia in *Kansas v. Marsh*, 548 U.S. 163, 197–98 (2006) (Scalia, J., concurring), but disputed by D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2006) (suggesting that previous studies have over- and under-estimated the error rate, and predicting a "corrected" estimation of 3.3%). Anecdotal evidence provided by the new online Registry of Exonerations suggests that for every one DNA exoneration, two non-DNA exonerations exist. *See New Exoneration List Shows Some Patterns*, *supra* note 142 (calculating that approximately one-third of the exonerations included on the Registry involved DNA evidence).

¹⁵¹ Assuming the "corrected" error rate of 3.3% proposed by Risinger, *supra* note 150, is accurately applied to the approximately 98,000 criminal jury trials that are held in state courts each year there are a total of 3,240 erroneous convictions annually from criminal jury trials alone.

¹⁵² *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

testing the truthfulness of his testimony.”¹⁵³

Appellate standards, too, are not doing an adequate job of ferreting out error.¹⁵⁴ If a jury’s decision is based on a credibility call, the nature of appellate (and collateral) review is such that even highly improbable prosecution narratives receive little functional scrutiny. Doctrines like clear error and harmless error abound. Under the widespread view that an ability to observe the witness makes one better able to assess credibility, appellate courts routinely refuse to reconsider the jury’s choice between competing witness narratives. For example, as the Supreme Court has instructed in the context of federal habeas, a reviewing court is “not require[d] . . . to ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’”¹⁵⁵ Indeed, acknowledging the remarkable hurdle presented by the clear error standard, at least one commentator has suggested that clear error is found only when “the judge believes physically impossible things, or disbelieves testimony supported by unrefuted documents.”¹⁵⁶

Cost-effective methods for improving the accuracy of trial outcomes should also be a priority because the safeguards in the system that do exist are, in many cases, failing.¹⁵⁷ Testing witness credibility in the crucible of cross-examination is certainly an endeavor fraught with challenges. But in our adversarial system, a

¹⁵³ Angela J. Davis, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 54 (Oxford University Press 2007).

¹⁵⁴ See John J. Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1, 4–5 (1950).

¹⁵⁵ *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979) (citing *Woodby v. INS*, 385 U.S. 276, 282 (1966)).

¹⁵⁶ Timony, *supra* note 10, at 922 (citing *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 911 (7th Cir. 1996)); see also Fisher, *supra* note 12, at 579 (arguing that the jury verdict “present[s] to the public an ‘answer’—a single verdict of guilty or not guilty—that resolves all questions of credibility in a way that is largely immune from challenge or review”). See, e.g., *United States v. Barron-Cabrera*, 119 F.3d 1454, 1456 (10th Cir. 1997) (accepting an officer’s somewhat implausible claim that he was able to make a number of extremely detailed observations in nine-elevenths of a second while travelling at a relative speed of approximately 100 m.p.h.).

¹⁵⁷ Nothing in this Article is intended to suggest that the adequate funding of defender organizations should not be a top priority. The suggested modifications that I propose only acknowledge the reality that increased funding for indigent defense is a long-standing request that, for a variety of reasons, has been often ignored by state governments. Certainly, one can fairly argue that the criminal justice house is on fire, and the changes I propose will amount to little more than pouring a cup of water on the flames. There is merit to that critique. But the best is the enemy of the good. Increased funding is unlikely in the near term. Consequently, feasible steps should be taken to improve the system, even if only at the margins.

capable and equipped defense attorney is intended as a meaningful counterbalance. Through independent investigation and rigorous cross-examination, counsel helps the jury “fact-check” the prosecution’s narrative.¹⁵⁸ Unfortunately, though, defense counsel is often not prepared to reveal flaws in the prosecution’s case, and thus does not serve as a reliable counterbalance.¹⁵⁹ Despite the Supreme Court’s fifty-year-old mandate in *Gideon v. Wainwright*,¹⁶⁰ chronically underfunded and overburdened defender organizations nationwide have led to a crisis in indigent defense that is widely acknowledged.¹⁶¹ In too many cases, juries are left with little more than their untutored instincts to assess who is telling the truth. Certainly in an adversarial system improving the acuity of the fact-finder cannot compensate for unevenly matched opponents.¹⁶² But acknowledging that change will not completely ameliorate the problem is not a sufficient reason to forgo it altogether.

Finally, the accuracy of juror assessments matters because so many Americans are drawn into the jury system. Each year, fewer than 1% of American adults serve as jurors. However, statistics suggest that over the course of a lifetime, nearly 40% of all adults will

¹⁵⁸ See *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

¹⁵⁹ Citing a study of New York defenders, Professor Darryl Brown has noted that defense counsel visited crime scenes and interviewed witnesses prior to trial in just 4% of all non-homicide cases and in just 21% of homicide cases. Brown, *supra* note 147, at 1602–1603 (citing Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 762 (1986–87)). Brown found that defender rates for hiring experts were even lower—2% in non-homicide cases, and 17% in homicide cases. See *id.* (citing a number of studies examining the state of indigent defense). Indeed, even absent the question of unequal funding, many question whether cross examination is “the best way of discerning conscious falsehood.” See, e.g., Uviller, *supra* note 2, at 782–783 (quoting 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourne rev. ed., 1974)) (challenging the notion that cross examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth”).

¹⁶⁰ 372 U.S. 335 (1963) (holding that indigent criminal defendants must be appointed counsel by states).

¹⁶¹ See, e.g., Benjamin Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012); Martin Guggenheim, *The People’s Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395 (2012); David Simon, *Equal Before the Law: Toward a Restoration of Gideon’s Promise*, 43 HARV. C.R.-C.L. L. REV. 581 (2008).

¹⁶² As some scholars have noted, while limitations on prosecution budgets may, in a sense, work in a defendant’s favor by leveling the playing field, this is not true in all cases. In some cases, underfunded law enforcement offices lead to shortcuts in investigation that undermine the discovery of truth and may go uncorrected by defense counsel. Brown, *supra* note 147, at 1604–06.

have been empanelled at some point.¹⁶³ We should more carefully deploy such a substantial percentage of civic resources.

D. Despite Concerns, the Jury Should Be Improved, Not Replaced

The modifications advanced in this Article are intended to push the criminal justice system toward more accurate fact-finding.¹⁶⁴ Some context is needed, however, to honestly assess whether modification makes sense. Does the criminal justice system aspire to anything beyond accurate outcomes? Are there reasons to maintain the jury as an assessor of credibility, notwithstanding its well-documented fallibility? The answer to both these questions is yes.

While accuracy is important, it certainly cannot be said to be the only goal of the American criminal justice system. Peaceful dispute resolution is a second system objective.¹⁶⁵ The limitation of government power is a third.¹⁶⁶ Nevertheless, of these, accuracy is

¹⁶³ *Id.* at 3.

¹⁶⁴ Some commentators have suggested that improvements to system accuracy that are focused on trials are misguided, for “[a]judication is becoming a relatively less important procedural stage for truth-finding as investigation becomes more so.” Brown, *supra* note 147, at 1591. I certainly cannot dispute Professor Brown’s central contention that trial outcomes now represent only a tiny fraction of all criminal adjudications. But, with nearly 76,000 convictions each year resulting from trials in state courts, improvements to the accuracy of that system cannot be overlooked. Where the modifications proposed will enhance outcomes at nominal cost there is little reason not to pursue change.

¹⁶⁵ As Professor Darryl Brown has noted, a dispute resolution model of adjudication is ill-suited to criminal prosecutions. “Criminal law is public law. Citizens are not settling private disputes; the government is taking coercive action against individual citizens.” Brown, *supra* note 147, at 1609–10; *see also* Davis, *supra* note 153, at 61, 76 (“The prosecutor does not have a client. Instead she represents the state, which consists of everyone who lives in the jurisdiction she serves, including the defendant.”). Nevertheless, the model is one that we remain dependent upon, due to the historic evolution of public prosecutions from private suits and the absence of practical alternatives. *Id.* The staggering number of criminal cases resolved by plea negotiation evinces a systemic preference for resolution over accuracy. *Id.* at 1611–12. The reasons for this preference are no doubt resource driven.

¹⁶⁶ Foundational elements of the criminal justice system operate as significant limitations on government power. Constitutional mandates like the protection against unreasonable searches and the right against self-incrimination limit the authority of the state over its citizens—some would even say at the expense of accurate fact-finding. *See* Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983); Brown, *supra* note 147, at 1597, 1610. Such an oppositional view of the multiple goals of the system is not, however, universal. *See, e.g.,* Stone v. Powell, 428 U.S. 465, 523–24 (1976) (Brennan, J., dissenting) (“Even if punishment of the ‘guilty’ were society’s highest value—and procedural safeguards denigrated to this end—in a constitution that a majority of the Members of this Court would prefer, that is not the ordering of priorities under the

primus inter pares—first among equals. Inaccuracy comes in two forms—false positives and false negatives. This Article explores ways to reduce the number of false positives. As noted in the preceding section, false positives result in significant consequences for the individuals who are wrongly convicted. And this is not their only cost. In addition, to the extent perceived arbitrariness bears on a system's continued authority, false positive have system-wide impacts. Without system accuracy, popular support for the criminal justice system crumbles.¹⁶⁷ Voluntary cooperation and compliance with criminal laws are enhanced by a perception of the system as legitimate.¹⁶⁸ When people cannot trust the system to correctly identify and fairly punish wrongdoers, the system's ability to resolve disputes erodes as voluntary compliance drops and so-called vigilante justice rises.¹⁶⁹ At some point, the system is no longer seen as a viable (peaceful) alternative to personal vengeance. It should be noted, though, that vigilantism, while not entirely a concern of false negatives, is primarily so. For that reason, it does not receive careful treatment in this Article. It is also true that, with the vast majority of criminal cases resolved through plea negotiations and not trial, the system-as-check-on-government-power model is more theory than reality. For these reasons, we should care deeply about the actual and perceived accuracy of the system.

It is important to note, though, that acknowledging the need for improved accuracy is consistent with a parallel commitment to

Constitution forged by the Framers, and this Court's sworn duty is to uphold that Constitution and not to frame its own. The procedural safeguards mandated in the Framers' Constitution are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the 'guilty' are punished and the 'innocent' freed; rather, every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty.").

¹⁶⁷ Widening concern about system accuracy can currently be seen in the form of state-funded innocence commissions and gubernatorial moratoria on death sentences. Maryland and Illinois, among others, have called for moratoria. In a similar vein, Connecticut and North Carolina have created commissions on wrongful convictions.

¹⁶⁸ Tom Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. LAW 231, 267 (2008).

¹⁶⁹ See generally Tracey Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 105 OHIO ST. J. OF CRIM. L. 106 (2005); Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT. INST. JUST. J. 23, 30 (noting that "fairness builds trust in the criminal justice system and that trust builds compliance with the law"), available at <https://www.ncjrs.gov/pdffiles1/nij/189106-1.pdf?q=ideas-in-american-policing>.

maintain the jury as primary fact-finder. There are a number of reasons why improvement rather than replacement should be our primary goal. The first is a matter of constitutional mandate—Article III and the Sixth and Fourteenth Amendments guarantee the right to a jury trial for crimes punishable by more than six months in jail.¹⁷⁰ Thus, for at least more serious crimes, the jury trial is a critical element of the adversarial criminal justice process.

The second is a matter of sheer practicality—someone has to do it. The continued functioning of our criminal justice system requires someone to make determinations about which witnesses are telling the truth in that small fraction of cases that proceed to trial. Without question, jurors presently are not particularly well-equipped for the task. But there is little reason to believe that any other group in the system would be naturally better-suited for the job. Anecdotally, some have suggested that the repeat experiences of trial judges give them particular expertise.¹⁷¹ At least one scientific study has found, however, that the challenges faced by jurors are challenges faced by all untrained individuals. Without additional training, trial judges are doing no better than other untrained observers when it comes to detecting truth-telling.¹⁷²

The primacy of the jury should also be maintained because the relationship between demeanor and credibility assessments cannot be challenged without a commensurate devaluing of the need for trials in open court.¹⁷³ Indeed, to deny entirely the ability of jurors to assess witness credibility would be to deny our system of jury trials. Making the jury primarily responsible for assessments of fact furthers our commitment to public trials (and our desire for finality) by making the trial the “main event.” And there is no question that the commitment to public trials and a commitment to finality are desirable aspects of any criminal justice system.

As prior commentators have recognized, public trials both protect against potential abuses of the defendant’s rights and keep

¹⁷⁰ U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend VI; U.S. CONST. amend XIV. See generally *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Blanton v. City of Las Vegas*, 489 U.S. 538 (1989).

¹⁷¹ *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (observing that the “trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise”).

¹⁷² See EKMAN, *supra* note 8, at 285, 335 (finding that trial judges and attorneys, among other law enforcement and legal professionals, did no better than chance when asked to assess credibility).

¹⁷³ Timony, *supra* note 10, at 914.

the public informed about the administration of criminal laws.¹⁷⁴ At one time, the presence of the jury was tantamount to a guarantee of open trials. This is because cases were tried by all freemen of the community, and presence was essentially compulsory.¹⁷⁵ The presence of the jury, thus, ensured the presence of a large segment of the local population. Modern day jurors, fairly and openly selected, stand as a proxy for the general public.¹⁷⁶ They thereby continue to carry out the earlier function, albeit somewhat symbolically due to their reduced number. As the Supreme Court acknowledged in a related context, the “open process [gives] assurance to those not attending trials that others [are] able to observe the proceedings and enhance[s] public confidence.”¹⁷⁷ While there is much to critique in our modern jury system, retreating from a paradigm that features the jury as a cornerstone of the criminal trial would risk a commensurate diminution in our commitment to the trial’s public nature. Such would be an unwelcome loss of an important mechanism of protection and information.¹⁷⁸ “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”¹⁷⁹

Alternatively, one must be wary of challenges to the current system that interfere too substantially with the critical concept of finality, which ensures societal respect for judgments, allows victims (and their survivors) to move past the immediacy of their trauma, and provides some assurance that the system’s limited resources will be focused at the point where the greatest number of express constitutional guarantees—like the right to a fair trial, the right to an attorney, the right to a jury of peers—are most salient. As the Supreme Court has noted, “there must be an end to litigation

¹⁷⁴ James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523 (1981).

¹⁷⁵ *Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501 (1984) (noting that the “presence of a jury already insured the presence of a large part of the public”) (internal quotations and citations omitted).

¹⁷⁶ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980).

¹⁷⁷ *Press-Enterprise Co.*, 464 U.S. at 507 (discussing the historically public nature of voir dire); cf. Davis, *supra* note 153, at 48 (commenting that the public’s lack of confidence in plea negotiations is driven in part by the process’ lack of transparency).

¹⁷⁸ “The trial is open to the public both to protect the defendant against prejudice and abuse and to serve the public’s interest in knowing how officials deal with those accused of crime.” Vorenberg, *supra* note 174, at 1523.

¹⁷⁹ *Richmond Newspapers*, 448 U.S. at 507.

someday.”¹⁸⁰ As one scholar eloquently stated, “what happens in the court is not theater.”¹⁸¹ Substantial second-guessing of the current system inevitably diminishes society’s commitment to the fairness of the initial proceeding. Taking this broader view forces the recognition that adopting rules that squander the time and resources invested at the trial level will not benefit the accused and will not benefit society.¹⁸²

Acknowledging the above, however, erects no bar to the modification that I pose. Certainly, one could argue that the new instructions or increased time with witnesses that I suggest below may provide additional fodder for appellate counsel. And, in fairness, as the system wrestles with these new additions, we may see a brief period of mild turmoil as the system finds stasis. The very nature of the system, however, is to survive the evolution of doctrine as the common law is progressively refined. The problems in our current system will not dissipate by virtue of our refusal to acknowledge them. The reality is that jurors are not presently very good at accurately identifying liars. And while they should remain a central feature of the criminal justice system for all the reasons noted above, in light of the high costs of erroneous assessment, we must make them better.

IV. MAKING THE JURY BETTER: A PROPOSAL FOR MODIFICATION

The idea that jurors sometimes get it wrong is not terribly surprising. And, by most accounts, the system as a whole gets it right most of the time. So why all the fuss about modification? Can’t we proceed without detour along the established path? As the preceding section demonstrates, the answer to that last question is a resounding “no.” The frequency of and damage caused by incorrect assessments—individually, in the form of social disapprobation and loss of liberty, and systemically, in the form of erosion of system legitimacy—offer ample reason for adjustment.¹⁸³ The modifications proposed in this Article are born from that truth.

The modifications proposed in this Article begin with the

¹⁸⁰ *Ackerman v. United States*, 340 U.S. 193, 198 (1950).

¹⁸¹ Vorenberg, *supra* note 174, at 1523.

¹⁸² *Cf. Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (adopting a restrictive federal habeas rule that the Court believes will “have the salutary effect of making the state trial on the merits the ‘main event,’ so to speak, rather than a ‘tryout on the road’”).

¹⁸³ *Cf. Stephen A. Saltzburg, Voice Identification Experts*, 27 CRIM. JUST. 48, 50 (Winter 2013) (advocating juror education with regard to the fallibility of voice identification testimony in light of the contribution such testimony has made to wrongful convictions).

premise that the accuracy of jury verdicts is important both to individual parties and to the continued authority of the system. From that starting point, the notion that the jury is (and should remain) the entity most appropriately assigned the task of assessing witness credibility is accepted as a given.¹⁸⁴ Next, the reality that jurors are not particularly accurate when making such assessments leads to the realization that doing nothing cannot be a recipe for success. Because jurors are not typically engaged in repeated service, we cannot expect the benefit of a learning curve. With rare exception, each new jury will start from scratch. Thus, the rational conclusion is that intervention prior to or during each trial is needed to improve the accuracy of outcomes. We should better prepare jurors by telling them what we know about lie detection. We should also reduce the gap between jurors and witnesses to provide an opportunity for more accurate assessments. Finally, we should directly confront juror skepticism about the process as it involves witnesses. Let's take each of those up in turn.

First, we should better educate jurors about how to make credibility assessments. While far from perfect, our understanding of credibility cues has progressed to the point that we can confidently say some things about how best to tell when a speaker is lying (and about what is irrelevant to that assessment). Though we will no doubt see continued refinement in the field, there are some conclusions that are now widely accepted.

What we know for sure about lying is when one of the dominant "lying emotions" is present, the demeanor in most people typically changes in specific ways. Being attentive to these changes, or behavioral clues, can help an observer make some determination about a speaker's likely veracity.¹⁸⁵ We also know that, as a general rule, a change in a witness's demeanor is a far more reliable indicator of lying than observation of a characteristic regularly displayed.¹⁸⁶

¹⁸⁴ As the discussion above demonstrates, the current sense that juries make credibility assessments because they have a natural gift for the task is a relatively new notion. That history is highlighted not to suggest that the responsibility should be sited elsewhere in the system, but rather to ground the call for modification in a more historically accurate context.

¹⁸⁵ "Deception clues" and "leakage" are the primary labels that have been applied to the behavioral revelation of falsehood. Deception clues are behavioral clues that give the audience some indication that a lie is being told. Such clues include changes in facial expressions or body position, voice inflection, speech patterns, and breathing rates. Leakage is the unintended release of truthful information that reveals the falsehood. For a fuller discussion see EKMAN, *supra* note 8, at 42.

¹⁸⁶ Jenkins & Johnson, *supra* note 119, at 38; see also EKMAN, *supra* note 8, at 295

When the behavioral cues about the speaker's emotional state do not match the words she is speaking, most researchers agree this, too, is strong evidence that the speaker may be lying.¹⁸⁷ Pauses or stumbles in speech, when "there is no reason why the [witness] should not know what to say, and the [witness] usually does not talk that way," is also strong evidence that a person may not be telling the truth.¹⁸⁸ The longer a witness speaks, the more accurate a determination of credibility is.¹⁸⁹ And, the more clues there are to deception—face, body, voice, words—the more accurate assessments are likely to be.¹⁹⁰

In addition, there are things we know about what information is not relevant to credibility assessment. For example, most experts agree that evidence of fear, while useful, is not coterminous with evidence of lying. "People who often falsely accuse, who repeatedly disbelieve the truthful, establish a relationship that makes fear signs ambiguous, likely whether their suspect is truthful or lying."¹⁹¹ In such situations, emotion may be a sign of deceit or a sign of how strongly an honest person feels about being disbelieved . . . again. In all instances, audiences must consider, and attempt to rule out, explanations for observed demeanor clues other than fabrication. Jurors should be told all of this. And there is reason to believe that conveying the information to jurors would improve their ability to gauge truth. A number of studies suggest that the accuracy of deception detection can be increased with moderate amounts of

("We will not be misled by a person's idiosyncrasies if we focus on changes in behavior.").

¹⁸⁷ See, e.g., Matsumoto *supra* note 93, at 5; EKMAN, *supra* note 8, at 286 ("When someone looks or sounds afraid, guilty, or excited and those expressions don't fit what the words say, it is a good bet the person is lying.").

¹⁸⁸ Vrij & Mann, *supra* note 102, at 67; see also EKMAN, *supra* note 8, at 286.

¹⁸⁹ EKMAN, *supra* note 8, at 331 ("The more talk the better It is not just because there will be more clues in the words, but also because there will be more clues in face, body, and voice when people are talking."). Interestingly, though, if an interaction with a speaker moves from "observation" to "friendship," this can hamper one's ability to assess truthfulness. *Id.* at 337 ("Trust makes one vulnerable to being misled, as usual levels of wariness are reduced and the benefit of the doubt is routinely given. Involvement in a relationship also can lead to confidence in one's ability to detect deception, and such confidence may itself make one more vulnerable. Familiarity should be an unmitigated benefit only when it is with a person one has had reason to distrust, and about whom one has acquired knowledge of how and when they betray the relationship.").

¹⁹⁰ EKMAN, *supra* note 8, at 350.

¹⁹¹ *Id.* at 175. This observation would be relevant if, for example, a witness in a criminal case had experience with or exposure to wrongful accusations by authorities.

training.¹⁹²

Moreover, we should share this knowledge with jurors *before* asking them to make uninformed evaluations in any particular case. Any new instructions should, of course, be narrowly drafted to provide only those conclusions that enjoy broad acceptance. And any instruction scheme should be undertaken with an understanding that updates must be expected as new discoveries are made.¹⁹³

Of equal importance is the manner of conveyance. One could imagine any number of ways in which information might be conveyed to jurors—for example, through the testimony of an expert or through instructions provided by the court.¹⁹⁴ A juror information campaign undertaken by the court system is yet another option.¹⁹⁵

¹⁹² See, e.g., Janna M. Crews, Jinwei Cao, Ming Lin, Jay F. Nunamaker, & Judee K. Burgoon, *A Comparison of Instructor-Led vs. Web-based Training for Detecting Deception*, 8 J. STEM EDUC. 31 (2007); Stephen Porter, Marcus Juodis, Leanne M. ten Brinke, Raymond Klein & Kevin Wilson, *Evaluation of the Effectiveness of a Brief Deception Detection Training Program*, 21 J. FORENSIC PSYCHIATRY & PSYCH. 66 (2010); see generally, Mark G. Frank & Thomas Hugh Feeley, *To Catch a Liar: Challenges for Research in Lie Detection Training*, 31 J. APPLIED COMM. RES. 58 (2003). But see Lucy Akehurst, Ray Bull, Aldert Vrij & Gunter Kohnken, *The Effects of Training Professional Groups on Lay Persons to use Criteria-Based Content Analysis to Detect Deception*, 18 APPLIED COGNITIVE PSYCH. 877 (2004); Jaume Masip, Hernan Alonso, Eugenio Garrido & Carmen Herrero, *Training to Detect What? The Biasing Effects of Training on Veracity Judgments*, 23 APPLIED COGNITIVE PSYCH. 1282 (2009).

¹⁹³ Sharing with jurors what science has discovered about perception is not entirely novel. In recent years, there have been ever louder calls to improve jury information about the accuracy of eyewitness testimony. See Penrod & Culter, *supra* note 87, at 3 (finding that there was little question jurors heard and understood evidence that undermined the reliability of eyewitness identifications, “but they basically did not use the information when making judgments about the accuracy of the identification, culpability of the defendant, strength of the prosecution’s and defense’s case, or credibility of the witness”); see also Sonenshein & Nilon, *supra* note 9, at 270–74 (summarizing the more recent findings regarding the reliability of eyewitness testimony).

¹⁹⁴ See, e.g., Blumenthal, *supra* note 112, at 1201.

¹⁹⁵ For example, many states have Jury Improvement Programs that are run by the state’s Administrative Office of the Courts. Such projects have a stated mission “to undertake improvements to all aspects of the jury system, including efficient juror utilization, care and treatment of jurors, citizen expectations about jury service, juror comprehension and education, and trial efficiency.” See Jury Improvement Program, Fact Sheet, ADMINISTRATIVE OFFICE OF THE COURTS FOR THE STATE OF CALIFORNIA (May 2011), available at <http://www.courts.ca.gov/documents/jurysys.pdf>; see also Executive Summary, *supra* note 137. Such “public information” projects have been proposed to remedy other deficiencies in the criminal justice system. For example, Professor Angela J. Davis proposed a public information campaign to help combat the problem of prosecutorial misconduct. As Professor Davis noted, prosecutorial accountability is virtually impossible in a culture in which the public has very little information about the duties and responsibilities of prosecutors. Better informing the public, Professor Davis noted would “both empower citizens to hold prosecutors

Though I am somewhat agnostic about the precise method of delivery, it is essential that the information be provided in an objective manner. For this reason, expert testimony, if provided by a party, might elicit criticism—while a court-sponsored program would not.¹⁹⁶ So too, written or videotaped information provided to the pool or preliminary instructions offered by a trial court are both seemingly unobjectionable methods of impartial conveyance. Moreover, though some commentators have urged a contrary result, the appearance of bias or undue influence is minimized if assessment information is presented without specific reference to particular witnesses.¹⁹⁷ Avoiding reference to particular witnesses will also avoid the danger of potentially usurping the jury's primary function.¹⁹⁸

Once equipped with the information necessary to more accurate assessments, jurors should then be provided a context in which to apply that knowledge reliably. Specifically, we must give jurors more meaningful opportunities to observe witnesses so that their observations have the greatest opportunity for accuracy. We do this by reducing the familiarity gap between the witness and the jury.

Very few people are able to assess credibility on a first meeting. This is because only a handful of clues to deceit are meaningful standing alone. Slips of the tongue, emotional tirades, emblematic slips, and micro-expressions may reveal deceit without prior experience with the speaker. These obvious forms of slippage, however, are not the norm. Despite the prevalence in nightly crime dramas of a defendant's tearful confession from the witness stand,

accountable and help promote confidence in the criminal justice system." Davis, *supra* note 153.

¹⁹⁶ See, e.g., *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (expressing concern that the paid expert would be the one making the credibility assessment). Note, however, that cultural competence experts are currently allowed in immigration proceedings to help judges assess, for example, a trauma victim's demeanor.

¹⁹⁷ See, e.g., Timony, *supra* note 10, at 942 (suggesting that courts be "more receptive to scientific testimony that would help determine demeanor credibility").

¹⁹⁸ In the context of eyewitness testimony, reform proposals have been met with mixed reaction in part out of concern for the usurpation of jury function. The Eleventh Circuit, for example, has completely banned expert testimony concerning eyewitness identification while several states have accepted or even required it. *United States v. Smith*, 148 Fed. App'x 867 (11th Cir. 2005); *People v. McDonald*, 690 P.2d 709 (Cal. 1984); *People v. LeGrand*, 867 N.E. 2d 374 (N.Y. 2007); *United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999). The resistance to informing juries of problems with eyewitness identifications is not seen with proposed changes at the source. To wit, proposals to modify identification procedures in police departments have been widely welcomed. See Brown, *supra* note 147, at 1616–17.

juries more typically assess credibility based upon less concrete measures. Within these, individual quirks and characteristics may suggest the presence (or absence) of honesty, when in fact the opposite is true. Meaningful assessments of credibility are thus largely reliable only when made comparatively against the particular speaker's baseline.¹⁹⁹

Obviously, court scheduling and funding constraints limit the amount of time that a jury may have with any one witness. But there are ways to improve the jury assessment with only minimal cost. For example, witnesses might be "introduced" to the jury through preliminary questions that do not seek to unearth any material relevant to the trial itself. Such questioning would give a jury an opportunity to familiarize itself with each witness's speech patterns and characteristics. Though certainly not a perfect substitute for the true familiarity gained by repeated exposure, such preliminary inquiry would at least offer the jury some context. Beyond exposing the jury to each witness' "baseline," such preliminary questioning would also give the jury an opportunity to assess the emotional level of the witness at the time of questioning. A witness who is afraid of appearing in court may appear to be lying. If that fear has been unmasked in a series of preliminary questions unrelated to the subject matter of the trial, the jury will have a better sense of how to consider the witness's fearful appearance during later inquiry.

Finally, it should be noted that enacting the above proposals will do nothing to improve accuracy if we do not do more to actively confront juror skepticism. We are all familiar with the turn of phrase "where there is smoke there is fire." Jurors are told to avoid that supposition and presume a defendant is innocent until proven guilty beyond a reasonable doubt. But that admonition is far more difficult to embrace than we commonly acknowledge. Though frequently derided by defense attorneys, a "presumption of guilt" is more reasonable than we admit. Skepticism helps jurors make sense of an otherwise deeply troubling world. It is difficult to rationalize a world in which significant percentages of innocent people are imprisoned for things they did not do. It is troubling to imagine prosecutors or witnesses working to secure false convictions in more than the rarest of cases. Cynicism allows jurors, who have not already borne witness to system failure, not to confront such a possibility. If instead the accused is likely guilty, and any defense witnesses offering a counter-

¹⁹⁹ EKMAN, *supra* note 8, at 167–68.

narrative are disbelieved, the world appears far more rational. Such lopsided skepticism, however, distorts jurors' ability to accurately assess the witnesses before them. To reduce such distortion, jurors should be encouraged to confront their own preconceptions. Jurors should be explicitly instructed that their role is to test, not confirm, the narrative provided by the prosecution.

V. CONCLUSION

There are a number of significant reasons why the jury is a necessary and valuable component of our modern criminal justice system. But accepting that truth does not also require blind acceptance of the counterfactual narrative that juries simply do it better. Our criminal justice system is responsible for the incarceration of millions of American citizens. By some estimates, thousands of those incarcerated annually may be wrongfully convicted following jury trials. For them, it is a particularly "mournful instant . . . when society withdraws and consummates the irreparable abandonment of a sentient being!"²⁰⁰ But there are things we can and should do to improve the system. This Article proposes a first step towards presenting the best cases we can with the least amount of disruption to the system. The time has come to begin that work in earnest.

²⁰⁰ HUGO, *supra* note 64, at 72.